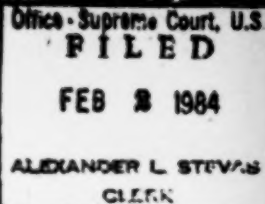


83-1282



NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

MATTHEW SHUTTLEWORTH and

DEBORAH SHUTTLEWORTH,

Petitioners,

VS.

CATHOLIC FAMILY SERVICES, and

LICENSED FOSTER PARENTS,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS OF ALABAMA

Of Counsel:

Joel E. Dillard
Counsel of Record
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QUESTIONS PRESENTED FOR REVIEW

An unwed father's parental rights were terminated by an Alabama Family Court without service of process or notice to him, and without any evidence of his consent other than erroneous third-hand hearsay from a social worker who later admitted neither meeting him nor communicating directly with him prior to the hearing. The Family Court placed his child in the custody of "anonymous foster parents" planning to adopt the child, and denied the natural father's demands to set aside the termination order. This denial was reversed by the Alabama Supreme Court, and the case was remanded for a hearing to determine the natural father's parental rights vis-a-vis those of the foster parents. On remand, the Family Court heard uncontradicted evidence that the father had never indi-

cated consent to anyone, and that the social worker had violated numerous Alabama Department of Pensions and Security regulations requiring contact with and consent from an acknowledged unwed father prior to termination of his parental rights. At this second hearing, the Family Court refused a demand from counsel for the natural father for an opportunity to confront and cross-examine the anonymous foster parents, but allowed an attorney for the foster parents to intervene on their behalf and confront and cross-examine the natural father. The Family Court also accepted ex parte letters from counsel for the anonymous foster parents and counsel for the social worker praising their character and fitness -- letters which the father was powerless to refute.

Your petitioners respectfully request this Honorable Court to review the following questions:

1. Was the unwed father denied due process of law when his parental rights were terminated without service of process or notice?

2. Was the unwed father denied due process of law when the Family Court refused his demand to confront and cross-examine the anonymous foster parents who were seeking permanent custody of his child, while allowing counsel for the foster parents to intervene and to confront and cross-examine the father?

3. Was the unwed father denied due process of law when the Family Court accepted, prior to rendering its final order, ex parte letters from counsel for the foster parents and counsel for

the social worker describing the fitness of the anonymous foster parents?

4. Was the unwed father denied due process of law when the offending social worker admitted violating Alabama statutes and Department of Pensions and Security Regulations requiring notice and consent?

CERTIFICATE OF INTERESTED PARTIES

The undersigned, counsel of record, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

Matthew Shuttleworth - Petitioner

Deborah Shuttleworth - Petitioner

Catholic Family Services - Respondent

William J. Baxley; Baxley, Beck, Dillard

& Dauphin - Attorney for Petitioners

Joel E. Dillard; Baxley, Beck, Dillard
& Dauphin - Attorney for Petitioners
Susan Tuggle; Rodenhauser & Tuggle -
Attorney for Catholic Family Services
James Beech; Tweedy, Jackson & Beech -
Attorney for Anonymous Foster Parents
Robert Sutton - Guardian Ad Litem
Concerned United Birthparents - Filed
Brief of Amicus Curiae in the State
Court and will do so here if the
Writ is granted and permission is
obtained
"Anonymous Adoptive Parents" of the
Petitioner's Daughter

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MATTHEW SHUTTLEWORTH and
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vs.

CATHOLIC FAMILY SERVICES, and
LICENSED FOSTER PARENTS,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS OF ALABAMA

Petitioners pray that a writ of
certiorari issue to review the opinion
and judgment of the Alabama Court of Civil

Appeals entered in these proceedings on July 6, 1983. The Alabama Supreme Court denied certiorari on November 4, 1983.

OPINION BELOW

The opinion of the Alabama Court of Civil Appeals is reported as Shuttleworth v. Catholic Family Services, 439 So.2d 1292 (Ala.Civ.App. 1983), and appears as Appendix A. This protracted litigation produced two earlier appellate decisions from the Alabama Supreme Court: Ex Parte Shuttleworth, 410 So.2d 896 (Ala. 1981), which appears as Appendix B, and Ex Parte Nice, 429 So.2d 265 (Ala. 1982), which appears as Appendix C. In Alabama, Family Courts enter orders upon a "case action summary sheet"; this document, reflecting all trial court orders in this cause, appears as Appendix D.

The ex parte letters referred to herein were discovered after notice of appeal was filed, but were certified to the Alabama Court of Civil Appeals by the Jefferson County Family Court as part of the record on appeal; they appear as Appendix E. The Alabama statutes and its Department of Pensions and Security Regulations applicable to social worker/unwed father contact and notice appear as Appendix F. Appendix G is the Alabama Court of Civil Appeals decision which was reversed by the Alabama Supreme Court the first time this case was appealed; it is reported as 410 So.2d 894 (Ala.Civ.App. 1981). Appendix H shows the manner by which the constitutional issues herein were raised in the trial court.

JURISDICTION

The Alabama Supreme Court denied certiorari on November 4, 1983. This Petition for Certiorari was filed within 90 days after that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

STATUTORY AND CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment
Fourteen:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction to equal protection of the laws."

Alabama Statutes, Rules and Regulations
at Appendix F.

STATEMENT OF THE CASE

Matthew Shuttleworth (hereinafter, "the father") and his three month old child were the subjects of an Alabama Family Court order terminating the custody rights of each to the other on March 25, 1980. The Family Court acknowledged a failure of its clerk to obtain service of process upon the father, but proceeded in his absence to terminate his parental rights without notice to him, as follows:

It having been made to appear to the Court that the putative father, Matthew Alan Shuttleworth, does have knowledge of this hearing, has discussed the case with the social worker with the Catholic Social Services indicating his consent, and having failed to appear, and the Court having considered and understood the same, is of the opinion that it would be in the best interests of the future welfare of said child that the putative father be relieved of its custody, all interested parties in open court having expressed consent and agreement to the order herein made, it is, accordingly, ordered, adjudged,

and decreed that all parental rights which the putative father, Matthew Alan Shuttleworth has in or to the care and custody of said infant, Mary Ann Matthews, be and they hereby are terminated and severed, said child is hereby committed to the Catholic Social Services for permanent placement or adoption.

The Alabama Supreme Court recognized that the social worker, by her own subsequent admission, saw the father for the first time almost two months after his parental rights were terminated upon the basis of her testimony. It reversed a summary denial of the father's motion to set aside the order terminating his parental rights, and remanded the case for a second custody hearing before a different trial judge.

On remand, the social worker admitted having fraudulently notarized a "consent paper" with the father's signature upon it after his parental rights were terminated, but she never filed it with the

Family Court and only produced it when required to do so in response to a discovery motion. Prior to this second hearing, the Family Court received the letters which appear as Appendix E, but neither the court nor the attorneys submitting them to the court favored counsel for the father with copies. After receiving these letters, which urged the court not to make the foster/proposed adoptive parents parties to the second hearing (and which went on to describe the foster parents as "truly outstanding people" and "competent and extremely good parents"), the trial judge refused to involve them in the proceedings -- denying the father the right to confront and cross examine them. Remarkably, the same trial judge at the same time allowed the attorney for the foster

parents to intervene in the proceedings and to proceed to confront and cross-examine the father at the second hearing -- a hearing to determine the relative fitness of the father for custody as it weighed against the relative fitness of the foster parents.

The Alabama Court of Civil Appeals heard each of the issues raised herein and rejected the father's insistence that each violated due process. After hearing the case twice before, the Alabama Supreme Court then denied certiorari.

REASONS FOR GRANTING THE WRIT

1. The Alabama Court of Last Resort has Decided a Federal Constitutional Question in a Way Which Conflicts with the Decisions of this Court in Armstrong v. Manzo, 380 U.S. 545, and Lehr v.

Robertson, ___ U.S. ___, 103 S.Ct. 2985,
77 L.Ed.2d 614 (1983), and Mullane v.
Central Hanover Bank, 339 U.S. 306.

Armstrong held that failure to notify a divorced father of the pendency of proceedings which would result in adoption of his daughter deprived him of due process of law so as to render the decree in question invalid. Mr. Armstrong, like Matt Shuttleworth here, promptly sought counsel upon learning of a "hearing" which terminated his parental rights, and the two of them quickly filed a motion to set aside the decree. Mr. Justice Stewart, writing for this Court, noted that a failure of notice of pending adoption proceedings violates the most rudimentary demands of due process of law, citing Mullane v. Central Hanover Bank, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed.

865 (1950). Moreover, Armstrong addressed, at 380 U.S. at 1191, in "burden of proof" terms the same issue Matthew Shuttleworth raises here regarding the anonymity of the foster parents who prevailed below:

Had the petitioner been given the timely notice which the Constitution requires, the Manzos, as the moving parties, would have had the burden of proving their case as against whatever defenses the petitioner might have interposed. [Cit. omitted] It would have been incumbent upon them to show not only that Salvatore Manzo met all the requisites of an adoptive parent under Texas law, but also to prove why the petitioner's consent to the adoption was not required. Had neither side offered any evidence, those who initiated the adoption proceedings could not have prevailed.

Code of Alabama 1975, § 12-15-63 (Appendix F) requires advice to the unwed father of his "rights under law" and makes the setting for this advice an "appearance at intake and before the court." Code

of Alabama, § 26-10-3 requires parental consent before an adoption.

This Court's recent analysis of the rights of an unwed father to notice, in Lehr v. Robertson, ____ U.S. ____, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983) has not escaped the attention of your Petitioner. It is factually dissimilar to the case at bar. There, a father was seeking to block adoption proceedings after two years of legal inaction, and after taking little or no interest in his child. This Court appeared prescient regarding the case sub judice when, in Lehr, it distinguished cases where an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child and thereby creating an interest in personal contact with his

child [which] acquires substantial protection under the due process clause. Mr. Justice Stewart noted that this Court was concerned solely with whether New York adequately protected Johnathan Lehr's opportunity to form a significant personal relationship with his daughter. Matthew Shuttleworth has been coming forward in this litigation to participate in the rearing of his child since May 21, 1980, the day he learned his parental rights had been terminated. His efforts resulted in the following praise from the Alabama Supreme Court, 410 So.2d 896, at 901, when he first appeared there:

"Although Matthew and Deborah had requested the foster parents' presence at the hearing, the court declined to join them. There is no testimony whatsoever as to the fitness of the foster parents to have custody of Mary Ann. On the other hand, there is abundant testimony as to the fitness of the petitioners, buttressed with the

support of their very find parents and their financial incomes.

...

The court, likewise, may have been led astray by representations and statements made by Ms. Dinwitty, whether made with improper purpose or innocently. Out of the fires of adversity, strong personalities are molded. Their willingness to push forward in this litigation is indicative that they have developed the trait of perseverance."

Matthew Shuttleworth is thus similar in his posture before this Court to Wright Armstrong and Peter Stanley. Stanley v. Illinois, 405 U.S. 645 (1972). While Peter Stanley had raised his illegitimate children, he was no greater a victim of "procedure by presumption", which a majority of this Court noted is always cheaper and easier than individual determination. 405 U.S., at 657. In this case, the presumption is that foster parents allowed to remain anonymous are more fit than an unwed father who weathered well the rigors of extensive cross-

examination at a lengthy custody hearing.

The final effect of the hearing to set aside the order terminating Matt Shuttleworth's parental rights was a denial under Rule 60(b) of the Alabama Rules of Civil Procedure (Appendix F). As this Court noted in Schroeder v. City of New York, 371 U.S. 208, citing Mullane, supra, the right to be notified has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. 371 U.S., at 212. Had Matthew Shuttleworth been given this right, it would have only been necessary for him to appear to win.

2. The Alabama Court of Last Resort
Has Decided a Federal Constitutional
Question in a Way Which Conflicts With the
Decisions of This Court in Goldberg v.
Kelly, 397 U.S. 254 and Greene v. McElroy,
360 U.S. 497.

The Family Court's refusal to allow the father to confront and cross-examine the foster/adoptive parents seeking to adopt his child ran roughshod over the elemental concepts of due process which were the underpinning of Goldberg, supra, and Greene, supra. Goldberg recognized that in almost every setting where important decisions are made, due process requires an opportunity to confront and cross-examine adverse witnesses. 397 U.S., at 269. Here the adverse witnesses were also adverse parties, the very persons seeking to take from Matt

Shuttleworth his daughter. To add insult to injury, these same adverse parties were allowed to intervene through an attorney who zealously confronted and cross-examined the father. This Court cited 5 Wigmore on Evidence (3rd ed. 1940) § 1367 in Greene for the proposition that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination. 360 U.S., at 497. To date there is no evidence of the fitness of the adoptive foster parents. Extensive cross-examination of the father revealed nothing to demonstrate that he is unfit. The Alabama Court of Civil Appeals' stamp of approval upon such a practice and procedure in its lower Family Courts invites repeated deprivations of due process of law.

3. The State of Alabama Has Condoned, Through Its Court of Last Resort, Ex Parte Communications Which Denied Your Petitioner a "Full Hearing" and Due Process of Law. This Court's Decision in Morgan v. United States, 304 U.S. 1, is in Direct Conflict with the Decision Below.

Morgan condemned a procedure whereby the Secretary of Agriculture, sitting quasijudicially, gathered his own facts through ex parte discussions with government prosecutors. Here, the judge who refused Matt Shuttleworth the right to confront and cross-examine the adoptive foster parents read ex parte letters from opposing counsel before making his decision. The letters appear at Appendix E, and describe the anonymous foster/adoptive parents as "truly

outstanding people" and "competent and extremely good parents". A remarkably similar case is Nevels v. Hanlon, 656 F.2d 372 (8th Cir. 1981), where a Commissioner of Labor received reports similarly in a state employee discharge case. The Eighth Circuit cited Morgan, noting that where a litigant is denied the fundamental right of confronting all the evidence, the entire proceeding is constitutionally defective. 656 F.2d, at 376.

In the case below, the ex parte communications were directly related to the ultimate issue: Who would have permanent exclusive custody of Matt Shuttleworth's daughter? The letters were received before the trial judge decided to allow the foster parents to remain anonymous and before he decided

to allow them to intervene through an attorney with nameless and absent clients. They were discovered by counsel for your Petitioner the day before briefs were due in the Court of Civil Appeals [long after the final decision denying Rule 60(b) relief], but were certified to that court, and the Alabama Supreme Court, by the clerk of the Jefferson County Family Court.

4. The Alabama Court of Last Resort's Order Decides a Federal Constitutional Question in a Manner Which Conflicts With Federal Courts of Appeals, and Which Has Not Been Settled By This Court: Did The Social Worker's and Trial Court's Violations of Alabama's Own Administrative Rules and Regulations Deprive The Petitioner of Due Process of Law?

The statutes and regulations which

require that a social worker in Alabama have direct contact with an unwed father before seeking to terminate his parental rights appear at Appendix F. Likewise, the Alabama statutes which require a court appearance and an "advice of rights" before such action can be taken. They can be summarized as follows: he must be advised of his right to counsel; advised of his "rights under law" at a "first appearance at intake and before the Court"; and informed of the allegations of the petition. By Regulations of the Alabama Department of Pensions and Security, the social worker must show the Family Court that less drastic measures than termination of parental rights have been unavailing; must interview the natural parents; must "exercise care to protect the unwed father"; must point out to him "the facts concerning consent"; must

determine why the child is surrendered and whether the natural parents are "satisfied with the arrangements"; and must tell the natural parents "the respective functions of the agency and the court". Each of these was violated or disregarded in the case at bar.

In International House v. NLRB, 676 F.2d 906 (2nd Cir. 1982), the Second Circuit relied upon an earlier Ninth Circuit decision, NLRB v. Welcome-American Fertilizer Company, 443 F.2d 19 (9th Cir. 1971) to hold that administrative bodies promulgating rules and regulations must follow their own guidelines or risk unjust discrimination which deprives due process. 676 F.2d, at 912. Later, in Derrickson v. Board of Education of St. Louis, 703 F.2d 309 (8th Cir. 1983), the Eighth Circuit similarly held that

a state agency's failure to follow its own regulations does, in appropriate cases, deprive a litigant of due process.

We submit that the gross violations of numerous regulations in the record here denied the father due process of law. The brevity required in petitions for certiorari prohibits our discussing at length the gravity of a deprivation which denies a father his own flesh and blood.

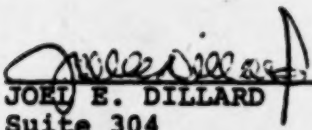
CONCLUSION

The impact of this case upon thousands of citizens in Alabama is clear. Absent relief from this Court, the acts and omissions of social workers and family courts in Alabama will be governed by the judgment below.

Where, as here, a record reveals interwoven due process deprivation -- a failure of service and notice, improper ex parte contact between parties and the judge, a subsequent refusal of the trial judge to allow a party to confront and cross-examine his adversaries, and repeated disregard for a family court's and social agency's own rules and regulations -- there is more at stake than one father's loss of his child. Alabama is embarking upon a new process for placing babies in short supply into the custody of foster/adoptive parents. The decision of the Alabama Court of Civil Appeals is now guiding every social worker and every family court in Alabama. We respectfully urge this Court to grant the writ and prevent further similar

denials of due process in Alabama from becoming standard procedure.

Respectfully submitted,


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APPENDIX A

THE STATE OF ALABAMA -- JUDICIAL
DEPARTMENT
COURT OF CIVIL APPEALS OF ALABAMA
Civ. 3626

July 6, 1983,

Rehearing Denied August 10, 1983

Certiorari Denied November 4, 1983

Alabama Supreme Court 82-1136

WRIGHT, Presiding Judge

This case began March 11, 1980, by the filing of a petition to terminate the parental rights of Deborah Ann Kelley and Matthew Shuttleworth to a child born out of wedlock on January 1, 1980. The petition was filed by Catholic Family Services, which organization had been given custody of the child at birth by her mother. By judgments on March 11 and March 25, 1980, the rights of the parents were terminated and custody of

the child, with permission to place for adoption, was granted to Catholic Family Services.

On June 10, 1980, a Rule 60(b) motion was filed on behalf of the parents, who were then married, seeking to set aside the orders of March 11 and 25. After lengthy evidentiary hearing, the court entered a judgment on August 14, 1980, with extensive finding of fact, denying the 60(b) motion. Appeal of that judgment was brought to this court. We affirmed the judgment of the trial court by decision entered December 12, 1980, Kelley v. Licensed Foster Parents, 410 So.2d 894 (Ala.Civ.App. 1980). Our judgment was reversed by the Supreme Court of Alabama on October 2, 1981. Ex parte Shuttleworth, 410 So.2d 896 (Ala.1981). Application for rehearing

was denied by that court. An order of remand with directions was issued by this court, 410 So.2d 902, on February 24, 1982, to the trial court.

The remandment directions transmitted through this court to the trial court were contained in the last two sentences of the opinion. Id. at 901. Earlier in the opinion, the court determined that the order of the trial court terminating the father's parental rights should have been set aside upon hearing of the 60(b) motion because notice of the hearing for termination was not served in strict compliance with Rule 4.1(c)(2). Thereafter, the court noted that in hearing the 60(b) motion, the trial court held a "protracted custody hearing." The hearing was held without the presence of the adoptive parents. The supreme court set

out the principles controlling claims of custody between natural parents and foster parents. The court then stated that the issue of custody was best determined by the trial court and further said as follows:

"For these reasons the judgment of the Court of Civil Appeals is due to be reversed and the cause is remanded to the Court of Civil Appeals with directions to reverse the judgment of the Family Court of Jefferson County and require it to hold a hearing to determine the parental rights of the petitioners in the light of the principles set forth in this opinion. The family court is also to determine if there has been a valid waiver of rights made by the petitioners.

"Reversed and Remanded with Directions."

Upon application for rehearing, the chief justice (concurring in the result and denial of rehearing) added comment that the sole issue that should be considered by the trial court on remand

was "whether the natural father knowingly consented to the adoption of the child or otherwise waived his right to object." He further commented that the adoptive parents should remain anonymous.

Upon remand, motions were filed by Catholic Services for protection of the adoptive parents. Motions for discovery were filed by the natural parents. All motions were heard by the court on March 19, 1982. The trial court took all under advisement and sought from the supreme court clarification of its opinion of October 2, 1981. There was denial of clarification. The trial judge granted a motion of the natural parents to recuse and removed himself from the case.

In August 1982, the new trial judge denied Catholic Services' motion to protect the identity of the adoptive

parents. Catholic brought a petition for mandamus to this court. We granted the writ of mandamus. The effect was to preserve the anonymity of the adoptive parents until the issue of consent or waiver for the adoption by the father was determined by the trial court.

Petition for writ of mandamus to be directed to this court was granted with opinion on August 16, 1982. Ex parte Nice, 429 So.2d 265 (Ala. 1982). The supreme court reiterated much of its opinion of October 1981 and held that the trial court had broad discretion in permitting discovery to Shuttleworth. The court stated that discovery, of any information in the possession of Catholic Services "which might bear on the issue of whether the father waived his parental rights" was permissible. The court also

said that whether the identity of the proposed adoptive parents would be disclosed was a matter within the discretion of the trial court. However, it said that ordinarily the identity of proposed adoptive parents is not discoverable in a proceeding to rescind an adoption or to set aside an order terminating parental rights.

The chief justice entered a dissent joined by Justice Faulkner. The dissent pointed out that the area of disagreement with the majority was in the disclosure of the identity of the adoptive parents. It said the only issue to be heard was the validity, vel non, of the adoption proceedings. If the adoption was not valid, the natural parents were entitled to custody. If the adoption was valid,

the adoptive parents were entitled to custody. Thus the need to learn the identity of the adoptive parents so that relative fitness could be determined, was unnecessary in either case.

This court, in compliance with the directive of the supreme court, set aside its writ of mandamus. The trial court on October 20, 1982, set a hearing for December 6, 1982, upon the issue of consent and waiver of service of the adoption proceedings. Intervention of counsel for the adoptive parents was permitted on November 3, 1982.

The trial court heard testimony of ten witnesses on December 6 and 9, 1982, with arguments and written briefs. On January 12, 1983, the court entered a lengthy judgment including statement of evidence and finding of fact. The

conclusion was that Matthew Shuttleworth had waived all parental rights to object to the adoption of the child, Mary Ann Kelley. Shuttleworth appeals.

The preceding lengthy recital of the court history of this case is felt necessary for full understanding. To this court, the bottom line of history is that the present and future welfare of a child has been in limbo since its birth on January 1, 1980.

The primary issue presented by this, the third proceeding brought to us in this matter, is: did the court err upon remand in finding that Matthew Shuttleworth knowingly consented to the adoption of Mary Ann Kelley or that he waived his rights to object?

In beginning our discussion, it must be recalled that the supreme court in

its decision of October 12, 1981, Ex parte Shuttleworth, 410 So.2d 896 (Ala.1981), reversed this court's affirmance of the denial of a 60(b) motion by the trial court. That motion alleged fraud, undue influence and misrepresentation by Catholic Services upon the mother to secure her relinquishment of parental rights, and consent to adoption of her child. The motion also charged improper service of notice of hearing to terminate parental rights of the father. This court held that the trial court did not abuse its discretion in denying the Rule 60(b) motion on either ground.

The supreme court granted certiorari and held that we had erred in finding that valid service of notice was had upon the father. Having found service of notice of termination of parental rights legally

insufficient, the court said as follows:

"Having said all of this, we could stop here, reverse and remand the case, and leave dangling a very emotionally sensitive issue, as well as the future hopes and aspirations of several individuals, including a 21 month old infant."

The court then observed that the trial court, while entertaining the 60(b) motion, had, in effect, held a protracted custody hearing, though without the presence of the adoptive parents. It followed that observation with favorable comments about the natural parents and stated principles to be applied in custody claims between parents and nonparents. The supreme court concluded its opinion by stating that it was going to remand to the trial court for the "delicate balancing of these principles. . . ." The remand directions were then given as we previously quoted herein.

It is the best understanding of this court from these pronouncements of the supreme court that it considered that the hearing on the 60(b) motion expanded into a hearing to determine custody of Mary Ann Kelley as between the natural and adoptive parents. It determined that setting aside the termination of parental rights of the father for failure of legal service did not conclude the "sensitive issue" of custody.

In its opinion in Ex parte Nice, supra, the court, referring to its opinion in Shuttleworth stated:

"The third issue addressed but not decided was whether the unwed father had knowingly consented to adoption and whether the parents of the child had otherwise waived their rights to the child. We directed the Court of Civil Appeals to remand the cause to the family court of Jefferson County for a determination of this issue."

This clarification, followed by

discussion and quotations from the case of Williams v. Pope, 281 Ala. 416, 203 So.2d 271 (1967), must have caused the trial court to limit the hearing on remand to the issue of consent or waiver or right by the natural parents to object to the adoption of their child. It is our opinion that such was the proper issue.

[1] Though the mother is now claiming to have been misled and confused by the representations of the social worker for Catholic Services, Mrs. Dinwiddie, there is more than sufficient evidence to conclude the contrary. She first sought an abortion, traveling with her parents and Shuttleworth to Atlanta for that purpose. Upon being informed that an abortion was not medically advised, she sought the aid of Catholic Services in giving birth at a place away from her

hometown. She allowed her child to be taken from the hospital and placed in a foster home. She signed a petition and consent for termination of her parental rights and those of the father, and she appeared in court when the judgment of termination of her parental rights was entered. The court proceedings were instituted away from her home county at her direction. She served as intermediary and informant between Catholic Services and Shuttleworth, keeping him informed of each event and step toward adoption of their child. She contrived, consented to, and participated in every aspect of the proceeding. She therefore may not change her mind and undo what she has done. Williams v. Pope, supra.

[2] The father, Shuttleworth, though

not physically participating as fully as the mother, was kept fully informed of everything she was doing. He was present on the trip to Atlanta to secure an abortion. He was present at the birth of the child in Tennessee. He was informed of the role of Catholic Services in that birth and the removal of the child from the hospital. He never saw his child nor contributed to the expense at her birth. He knew that the mother had agreed to her adoption long before she was born on January 1, 1980. He was informed by the mother of the termination of her rights and her consent thereto on March 11, 1980. He admitted to being informed that there was scheduled another hearing for March 25, 1980, of which he was to receive notice, to terminate his parental rights. He acknowledged that

he did receive the registered letter advising him of the hearing and containing consent and waiver form, albeit the letter was not served procedurally according to statute. He acknowledged that he subsequently signed the form contained in the letter at the request of the mother and gave it to her to return to Mrs. Dinwiddie for filing. The court found Shuttleworth had the letter at least ten days prior to the hearing on March 25. He denies opening the letter and examining its contents though he gave it to the mother and discussed with her its contents and the form for waiver of notice and consent. He admits failing to keep an appointment with Dinwiddie set for the morning of March 25. The court was at liberty to disbelieve his denial of opening and examining an official letter

from the court, when he knew of its purpose. In fact, the testimony of Shuttleworth and the mother pertaining to misrepresentation and misunderstanding of events leading to the adoption is subject to disbelief.

[3, 4] There has been considerable reference to the signing of a jurat to Shuttleworth's signature on the form by Mrs. Dinwiddie as a notary public. That jurat was removed by Mrs. Dinwiddie because she had not actually performed it. Concern about the jurat has little importance - first, because we find no statutory requirement that consent for adoption be notarized; second, because the signature of Shuttleworth to the instrument is admitted. The form he signed was an admission of knowledge of the pending proceedings and of their purpose. It contained an acknowledgment

of service and waiver of further notice. There was consent to termination of parental rights and to placement for permanent custody and adoption. We recognize that the waiver was apparently signed after the hearing and judgment and was not filed in the court. However, it is evidence and indication of the knowledge and state of mind of Shuttleworth after he knew of the judgment terminating the rights of the mother and the pending hearing as to his parental rights.

For some three months subsequent to the termination of parental rights and the direction by the court to find adoptive parents, the Shuttleworths made no effort to set aside the judgment. When this proceeding was begun the child had been in the custody of Catholic Services for her lifetime of nearly six

months. The mother had seen her no more that three times. The father had never seen her. Foster parents had fed her, held her, loved her while the parents proceeded with their lives as though they never had a child, even though they were in daily company and subsequently married. The dark secret of her birth and being remained hidden from their friends. She was exiled in a foreign land - until she found love, care and protective parents who wanted her so badly that they would pay a fee of a thousand dollars to get her. Thereafter, her existence was no longer denied. She came alive in the arms of parents who were proud of her. Parents who surely announced to all that they had a daughter and that she had a family.

[5] Our supreme court spoke poignantly

of the family unit as the basic foundation of our society and the duty of courts to forge chains that will bind it together in its first opinion in this case (R. 901). We endorse that expression. However, chains of a family unit in this case have been forged between Mary Ann and her adoptive parents. They have been bound together for more than three years. Mary Ann knows no other parents or family. It does not require the wisdom of a King Solomon to decide the real parents of this child nor to recognize the devastating trauma which will strike her if her family unit is broken. A family unit is forged through love and caring, one for the other. It does not arise merely from birth and blood. If that were the test, this case would never have arisen.

In Ex parte Nice, supra, the supreme

court said:

"[A] mere change of mind cannot justify the rescission of a decision to place a child for adoption if the natural parents have given an informed, intelligent consent and all the procedural safeguards have been followed."

It is our opinion that these conditions have been met; that the trial court correctly found as a fact that the mother consented and that the father with knowledge of the acts of the mother and the proceedings before the court, acquiesced therein and by his conduct waived his parental right to object to the adoption of his child. It is further our opinion that in regard for finality of judgment and in consideration of the best interest of Mary Ann, the motion 60(b) should be denied.

[6] The second issue presented is that the trial court after Ex parte Nice, supra, denied discovery of information

as to the adoptive parents, but permitted appearance of their attorney in the case. Shuttleworth also complains of the court receiving letters from counsel praising the adoptive parents. In response to this issue we note that the supreme court in Ex parte Nice, supra, expressly left discovery concerning the adoptive parents to the discretion of the trial court after specifically directing that the court's first course was to determine whether the "unwed father had knowingly consented to adoption and whether the parents of the child had otherwise waived their rights to the child." It is our conclusion that the trial court followed the mandate of the supreme court.

The trial judge did not solicit the letters received. He expressly stated he did not consider them and placed them

in the court file. The only issue before the court did not involve the consideration of the respective merits of the natural parents and adoptive parents. This court considers that counsel for the adoptive parents properly had an interest in the case (Rule 24, A.R.Civ.P) if only as amicus curiae. We find no error in allowing him to participate.

AFFIRMED.

BRADLEY and HOLMES, JJ., concur.

APPENDIX B

THE STATE OF ALABAMA -- JUDICIAL
DEPARTMENT

THE SUPREME COURT OF ALABAMA

80-311

October 2, 1981

Rehearing Denied February 5, 1982

Re In the Matter of

Mary Ann (Matthews) Kelley,
Matthew Alan Shuttleworth, Father,
and Deborah Ann Kelley, Mother

v.

Licensed Foster Parents, et al.

This is a case involving termination
of parental rights by the Family Court
of Jefferson County, Alabama.

We granted a petition for writ of
certiorari to the Court of Civil Appeals
to review the propriety of its affirmance
of the judgment of the Family Court of
Jefferson County, denying relief on a

Rule 60(b), A.R.C.P., motion to the natural parents of an illegitimate child. 410 So.2d 894. The poignant plea of these young parents for custody of their first-born child deserved and received careful and considerate attention by two of our courts. Nevertheless, they have not met with success. Because of a threshold procedural error, which may have substantially undercut the substantive issues involved in the case, we are constrained to reverse.

In order to place the issues in proper focus, we provide a brief statement of the facts. The petitioners Deborah Ann Shuttleworth (Deborah) and Matthew Alen Shuttleworth¹ (Matthew) are 21 years of

¹ The petition for certiorari was filed in this court under the name Matthew Alen Shuttleworth, although the case in the Court of Civil Appeals was styled Matthew Alan Shuttleworth.

age. A baby girl, Mary Ann Kelley (Mary Ann), was born to them on January 1, 1980, in the State of Tennessee. Deborah and Matthew were, and are, students at Calhoun Community College, are in love, and have, since the birth of their child, married. Matthew never denied paternity of the child and has relentlessly objected to adoption and objected to abortion. Deborah admits he is the father of the child. From the first time he learned that Deborah was pregnant, he wanted to marry her and become the legal father of the child. On the other hand, Deborah vacillated. She was ill during the pregnancy with pre-eclampsia, a physical disorder caused by a toxic condition developed in late pregnancy.

In her confusion and illness, she consulted with Laura Dinwitty (Ms. Dinwitty) of the Catholic Social Services Agency of

Huntsville, Alabama, about placing the child for adoption. She testified that she told Ms. Dinwitty that Matthew was opposed to adoption and would not consent thereto. In spite of this, Ms. Dinwitty wrote the court that, "Mr. Shuttleworth, age 21, is willing to sign the necessary papers and chooses to sign them stating that he neither denies nor admits paternity. He would like the papers mailed to him at his address, 211 Mark Street, Decatur, Alabama 35601."

On another occasion in a "court summary" she wrote "He (Matthew Shuttleworth) was contacted regarding the birth of Mary Ann Matthews and agreed to adoption placement. His present address is 211 Mark Street, Decatur, Alabama 35601."

At the time Ms. Dinwitty authored these statements, she had never met Matthew. These statements were before the court

for its consideration on March 25, 1980, when the parental rights of Matthew to his then three-month-old daughter were terminated. Doubtless, they entered into the decision making process and may have substantially influenced the court to order the following:

It having been made to appear to the Court that the putative father, Matthew Alan Shuttleworth, does have knowledge of this hearing, has discussed the case with the social worker with the Catholic Social Services indicating his consent, and having failed to appear, and

The Court having considered and understood the same, is of the opinion that it would be in the best interests of the future welfare of said child that the putative father be relieved of its custody, all interested parties in open court having expressed consent and agreement to the order herein made, it is, accordingly,

ORDERED, ADJUDGED AND DECREED BY THE court that all parental rights which the putative father, Matthew Alan Shuttleworth has in or to the care and custody of said infant, Mary Ann Matthews, be and they are hereby terminated and severed, and the care, custody and control of said child is hereby committed to the Catholic

Social Services for permanent placement or adoption.

By her statement, Ms. Dinwitty admits that she saw Matthew for the first time on May 21, 1980, almost two months after his parental rights were terminated. She said that she made the representation to the court concerning agreement of the father because the mother had said on one occasion that he would agree, although on other occasions she had said he would not agree.

Deborah testified in court that Ms. Dinwitty told her she had twelve months after the court hearing to make up her mind as to whether or not the surrender of her child would be permanent. Ms. Dinwitty denies making such a representation. She does not deny that she attempted to notarize a consent paper purportedly signed by Matthew Alen Shuttleworth, although she had not seen him sign it. Her jurat on

this particular paper was cancelled almost immediately by her, after considering the impropriety of making such a certification. This document was not presented to the court at the hearing on March 25, because it was not received until after the hearing was completed.

Ms. Dinwitty admitted that if she had handled the custody proceedings in Madison County, Alabama, she would have written the father and had direct communication from him before final hearing in Family Court. The proceedings were held in Jefferson County at the request of Deborah in order to protect the secrecy of her giving birth to an illegitimate child. In furtherance of the same purpose, the child was born in Tennessee. Similarly, Matthew says he signed the consent because he was told by Deborah that it was necessary to protect the secrecy of the

birth, but not to surrender his parental rights.

Although Matthew, along with his wife, is a student at Calhoun Community College, he is a licensed cosmetologist and works as such 40 hours per week. Matthew's parents, as well as Deborah's parents, have been supportive of them throughout their crisis. Harold Kelley, the father of Deborah, is employed with the Tennessee Valley Nuclear Division and earns an income in the \$30,000.00 to \$40,000.00 bracket. He has offered to his daughter and her husband anything that they might need in the way of financial or moral support for the help of the baby. Likewise, H.W. Shuttleworth, the father of Matthew Shuttleworth, is an instructor, basketball coach, and athletic director at Calhoun Community College. He earns approximately \$25,000.00 a year and has also agreed to

help support his son's child. Both of their spouses have offered to give any help needed.

It is uncontroverted that Matthew did not sign for the process notifying him of the termination hearing, as required under Rule 4.1(c)(2), A.R.C.P. The father of Matthew signed as agent for Matthew, but, in fact, was not his agent. After signing the papers from the Family Court, the father put the process in his son's room, where Matthew received it. Later, Matthew took the papers to Deborah who told him they were papers from the court which he should sign in order to protect the secrecy of the birth. Matthew testified that he thought that in any proceeding designed to terminate his rights, he would receive papers from the sheriff's office by way of a knock on his door and personal delivery. He said

[he had planned] that when he got those papers he would get a lawyer and fight the case. After learning that his parental rights had been terminated, on June 10, 1980, Matthew, along with Deborah, filed a motion under Rule 60(b), A.R.C.P., to set aside the court's order of March 25, 1980. The motion sought to join the adoptive parents, who at the time of filing of the motion had had custody of Mary Ann for only two months. They were not joined, however. On July 21, 1980, the court heard testimony on the motion and continued it to August 4 for additional testimony. The court, on August 14, 1980, entered a four-page order denying relief under the Rule 60(b) motion. The court concluded:

It is obvious that the proposed adoptive parents have acted in good faith and have taken the child in their home to be adopted. The

Court is well aware that regardless of its decision, there will be much sadness concerning the placement of this child. The Court is of the opinion that if such sadness must exist, the ones who allowed it to come into existence must be the ones to shoulder the burden.

At the outset, we must determine if Matthew was properly notified of the hearing set to determine if his parental rights in and to Mary Ann should be terminated. If he was not properly notified, then the Family Court of Jefferson County had no authority to terminate his rights. The Legal Clinic urges us not to disturb the judgment of the Family Court of Jefferson County, because Matthew Shuttleworth did receive notice of the March 25th hearing, albeit not in the exact form prescribed by Rule 4.1(c)(2), A.R.C.P. All that was lacking was his signature on the return receipt, and that this formality does not violate the due process requirements of

the United States Constitution. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). They go on further to say that an unwed father is not entitled to notice and even the appointment of counsel if he is indigent. Smoke v. State Department of Pensions and Security, 378 So.2d 1149 (Ala. Civ.App. 1979); Crews v. Houston County Department of Pensions and Security, 358 So.2d 451 (Ala.Civ.App. 1978); cert. denied, 358 So.2d 456 (Ala. 1978).

[1] In the seminal decision of In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), the Supreme Court of the United States declared that in delinquency hearings due process requires that adequate written notice, at the earliest practicable times, be afforded to the child and his parents or guardian, informing them of the specific issues they

must meet to allow them to prepare a defense. The court further held that in such delinquency proceedings the child and his parents must be advised of their right to be represented by counsel and that if they are not able to afford same, counsel should be appointed to represent them. Following that decision, legislatures of various states provided for such notice and counsel in delinquency cases. Such due process safeguards in Alabama are found in Code 1975, § 12-15-63. We can perceive no reason to guarantee these due process safeguards in a delinquency case and refuse them in a case terminating parental rights. In the former, the child is subject to severe punishment by incarceration or otherwise. In the latter, the natural bonds of family are subject to destruction. The judicial action in both instances

portends grave consequences, indeed. Our courts, to their credit, have perceived no distinction. The very case cited by the Legal Clinic, Smoke, is a termination of parental rights case, pure and simple, with no attendant delinquency procedures. The child in Smoke also was an illegitimate child.

Over 58 years ago, this court, in the case of Lewis v. Crowell, 210 Ala. 199, 200, 97 So. 691, 692 (1923), held that the father of bastard children was entitled to their custody. The court said:

The putative father of bastards, desiring the custody and control of them, is entitled to it against all but the mother, if competent to care for and suitable to take charge of them; and if it appears from the evidence that the best interest and welfare of the children will be thereby secured.

The critical question, however, is whether such a parent is entitled to notice prior to the revocation of any parental

rights which he might have? In the leading case of Singuefield v. Valentine, 159 Miss. 144, 132 So. 81 (1931), Annot., 76 A.L.R. 238 (1932), it was held that a parent of legitimate children cannot be deprived of their custody without a hearing before a court of competent jurisdiction in which he has been properly served with process, has entered an appearance, and has been allowed an opportunity to appear and be heard. The same procedural safeguards now have been provided for the parents of illegitimate children by the United States Supreme Court decision in Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). There, the Illinois law provided that children of all parents could be removed from them in a neglect proceeding that entailed notice, hearing, and proof of parental unfitness. An unwed father, however, was subject to loss of

his children absent a showing of unfitness. He was not entitled to notice or hearing. The Illinois dependency law did not recognize such a parent's interest in his illegitimate children. Upon their mother's death, such children became wards of the state. The United States Supreme Court held that the unwed father's 14th amendment due process and equal protection rights were violated.

Having determined that an unwed father is entitled to proper notice and a hearing in proceedings to terminate parental rights, we now must determine whether or not such notice was afforded Matthew in the instant case. Rule 13, Alabama Rules of Juvenile Procedure, provides that: "service of summons shall be pursuant to the Alabama Rules of Civil Procedure except as herein-after provided." Service was attempted on Matthew Shuttleworth under Rule 4.1(c)(2). That section reads as follows:

How Served. The clerk in that event shall place a copy of the process and complaint or other document to be served in an envelope and shall address the envelope to the person to be served with instructions to forward. He shall affix adequate postage, and place the sealed envelope in the United States mail as certified mail with instructions to forward, return receipt requested, with instructions to the delivering postal employee to show to whom delivered, date of delivery and address where delivered. When the person to be served is a natural person, the clerk shall also request restricted delivery, unless otherwise ordered by the court. The clerk shall forthwith enter the fact of mailing on the docket sheet of the action and make a similar entry when the return receipt is received by him.

The Committee's comment of Rule 4.1(c) provides that:

When the person to be served is a natural person, the clerk must require "restricted delivery" since this method of delivery has superseded the earlier provision for "deliver to addressee only." See Postal Bulletin 21033, February 13, 1975. Under the Regulation, this type of delivery is defined as follows:

Restricted Delivery provides a means by which a mailer may direct that delivery be made only to the

addressee or to an agent of the addressee who has been specifically authorized in writing by the addressee to receive his mail. This service is available only for articles addressed to natural persons specified by name...." Postal Service Manual, Sec. 165.31, February 7, 1975.

[2, 3] Clearly, the provisions of Rule 4.1(c) (2) were not complied with. The summons was not delivered to Matthew. He did not sign for it, and did not authorize his father as agent to receive it.

Rule 4.1(c) (2), A.R.C.P., introduced a new concept allowing service within the state by certified mail. We require strict compliance therewith. Matthew was under the impression he would be served in the old way by the sheriff or his deputy knocking on his door. The least he should be entitled to is that the innovative change would be strictly complied with.

In O'Donohue v. Citizen Bank, 350 So.2d

1049 (Ala.Civ.App. 1977), the Court of Civil Appeals had the occasion to construe the twin of Rule 4.1(c)(2), A.R.C.P. - Rule 4.1(b)(2). Rule 4.1(b)(2) provides:

As an alternative to delivery by the sheriff, process issuing from any court governed by these rules may be delivered by the clerk to any person not less than eighteen years of age, who is not a party and who has been designated by order of the court to make service of process.

In the O'Donohue case, services of summons was made by the plaintiff's lawyer, although he had not been designated by order of the court to make such service. On a motion to quash service because of this defect, the court then appointed plaintiff's attorney, thereby purportedly ratifying the attorney's previously illegal action. The Court of Civil Appeals held Rule 4.1(b)(2), A.R.C.P., must be strictly complied with and reversed and remanded the case. We agree its decision

in O'Donohue was proper, and it is in accordance with our resolution of the service problem in this case. Likewise, Rule 4.1(c)(2) must be strictly complied with. Having said all of this, we could stop here, reverse and remand the case, and leave dangling a very emotionally sensitive issue, as well as the future hopes and aspirations of several individuals, including a 21-month old infant.

It now has been one year since the Family Court overruled Matthew and Deborah's Rule 60(b) motion. Compared with other judicial systems, our courts can be complimented for their efficiency in processing actions. However, from the point of view of the interested parties the time must have seemed interminable. It appears from the

record that the Family Court, in entertaining the Rule 60(b) motion, in effect, held a second, but more protracted custody hearing. Although Matthew and Deborah had requested the foster parents' presence at the hearing, the court declined to join them. There is no testimony whatsoever as to the fitness of the foster parents to have custody of Mary Ann. On the other hand, there is abundant testimony as to the fitness of the petitioners, buttressed with the support of their very fine parents and their financial incomes.

The best interest of the child is the fundamental concern of the court in every child custody case. However, where there are conflicting claims between parents and non-parents and the parents are deemed by the court to be

fit and proper persons, the primary right to custody is with the parents. Chandler v. Whatley, 238 Ala. 206, 189 So. 751 (1939); Pendergrass v. Watkins, 383 So.2d 851 (Ala.Civ.App.1980). This court also has said that "the right of a parent, the mother or the father, to the custody and control of a child must not be concluded by one unbecoming or immoral act." Whitten v. Whitten, 214 Ala. 653, 654, 108 So. 751 (1926). The right of natural parents to have the custody of their offspring comports with the natural tendencies of our society. This in no way is meant to disparage the love and affection that non-natural parents have given to their adopted children. The family unit is the basic foundation of our society. There are forces at work which attempt to tear it asunder. It

is the duty of the courts to forge chains that will bind that unit together. Although Deborah, in her illness and confusion, sought to give away her child (she thought temporarily), she now sees, as Matthew has always seen, it is their duty to love, care for, and bring up their child and hopefully other children in a manner which will make them decent and respected citizens of this state and nation. Her mistake may have been due to over reliance on Ms. Dinwitty or misunderstanding her. The court, likewise, may have been led astray by representations and statements made by Ms. Dinwitty, whether made with improper purpose or innocently. Out of the fires of adversity, strong personalities are molded. Their willingness to push forward in this litigation is indicative that

they have developed the trait of perserverence.

However, we are unwilling to adjust the delicate balancing of these principles as they mesh in the factual situation that may exist with the persons involved at the present time. The trial court is peculiarly suited to perform this task. For these reasons, the judgment of the Court of Civil Appeals is due to be reversed and the case is remanded to the Court of Civil Appeals with directions to reverse the judgment of the Family Court of Jefferson County and require it to hold a hearing to determine the parental rights of the petitioners in the light of the principles set forth in this opinion. The Family Court is also to determine if there has been a valid waiver of rights made by the petitioners.

REVERSED AND REMANDED WITH DIRECTIONS.

FAULKNER, JONES, ALMON, SHORES,
EMBRY, BEATTY and ADAMS, JJ., concur.

TORBERT, C. J., concurs in the result.

MADDOX, J., not sitting.

ON APPLICATION FOR REHEARING.

TORBERT, Chief Justice (concurring
in the result and in the denial of
rehearing).

I concur in the decision of the Court
to remand this case for a determination
by the trial court of whether the natural
father knowingly consented to the adoption
of the child, or otherwise waived his
right to object. I believe that this is
the sole question to be dealt with by
the trial court. While the agencies
involved may be called upon to defend
their actions, I believe that the
adoptive parents must remain anonymous.

APPENDIX C

THE STATE OF ALABAMA -- JUDICIAL
DEPARTMENT

THE SUPREME COURT OF ALABAMA

81-941

August 16, 1982

Rehearing Denied September 17, 1982

In re In the Matter of
Mary Ann (Matthews) Kelley, et al.

v.

Licensed Foster Parents, et al.

This is the second time this sensitive
matter has been before this Court. In
Ex Parte Shuttleworth, 410 So.2d 896

(Ala.1981), three issues were presented:

(1) Whether an unwed father was entitled
to notice of a proceeding to terminate
parental rights; and, if so

(2) Was proper notice extended to the
father in this case?

We held that the unwed father was entitled

to notice and that he had not been afforded proper notice in this case in that Rule 4.1(c) (2), Alabama Rules of Civil Procedure, was not complied with.

The third issue addressed but not decided was whether the unwed father had knowingly consented to adoption and whether the parents of the child had otherwise waived their rights to the child. We directed the Court of Civil Appeals to remand the cause to the family court of Jefferson County for a determination of this issue.

As we have often noted, cases involving competing claims to young children are among the most difficult the Court is called upon to decide. The poignant facts in this case point out some of the reasons for that difficulty.

These young college students had an affair which resulted in Deborah's pregnancy. Matthew wanted to get married and legitimate

the child. Deborah consulted a Ms. Dinwitty with the Catholic Services Agency and told her that Matthew was opposed to placing the child for adoption, but Deborah apparently, at the time, preferred to relinquish the child for adoption.

Matthew claims that he never consented and, indeed, the facts in the first case seem to support his claim, but that is one of the issues to be decided by the family court on remand.

[1] In the meanwhile, pursuant to the family court's original order committing the child to the Catholic Social Services for permanent adoption, the baby girl has been taken into the home, and no doubt the hearts, of the proposed adoptive parents. It must seem to them, and to all people who find themselves in their position, manifestly fair to allow the natural parents to change their minds and to take

the child they have grown to love away. It is unfair, and a mere change of mind cannot justify the rescission of a decision to place a child for adoption if the natural parents have given an informed, intelligent consent and all the procedural safeguards have been followed. This has been made explicit by this Court in Williams v. Pope, 281 Ala. 416, 203 So.2d 271 (1967), where the following appears:

"Our research has revealed no case in this State specifically deciding the effect of a revocation of consent because of a change of mind by the natural parent after having given written consent to an adoption.

"Title 27, § 3, Code 1940 [now § 26-10-3, Ala.Code 1975], requires consent of parents for adoption except in certain cases, but our statutes are silent as to the revocation of consent.

"In 2 Am.Jur.2d, Adoption, § 46, p. 897, we find:

"In many jurisdictions the right of a parent to withdraw a consent to the adoption of a child is controlled and

limited by the provisions of the adoption statutes themselves, and aside from express statutory provisions the trend of modern authority is toward the position that a parent who has freely and knowingly given the requisite consent to the adoption of his or her child cannot, after that consent has been acted upon by the adoptive parents by bringing adoption proceedings, withdraw that consent arbitrarily, or as of right so as to bar the court from decreeing adoption. This is particularly true where, in reliance upon such consent, the proposed adopting parents have taken the child into their custody and care for a substantial period of time and bonds of affection have been forged between them and the child.'

"To like effect, see 2 C.J.S. Adoption of Children § 21(4), Pocket Part note 15.1; Annotation 156 A.L.R. 1011. We quote the following from In Re Holman's Adoption, 80 Ariz. 201, 295 P. 295 P.2d 372, 376, where it was noted that the courts are divided on the question, and cases from other jurisdictions are cited:

"The direct question of whether this consent is revocable is of the first impression in this court. In view of our holding,

however, that the best interest of the child is the paramount consideration of the court and in view of our interpretation of section 27-304, supra, relating to consent we hold that a consent once given by the parent or other persons having the authority to give such consent, may not be revoked after the child has been placed in the possession of the adoptive parents except for legal cause shown, as where such consent was procured through fraud, undue influence, coercion or other improper methods. Provided always, however, that the court may permit said revocation where upon hearing, it is shown that it will be for the best interest of the child that it be returned to its natural parents. Or if there are no parents, if it appears upon hearing that the best interest of the child will not be promoted by its adoption by the proposed adoptive parents, the adoption will be denied.'

"This holding is in accord with Tit. 27, §4 [now § 26-10-4, Ala. Code 1975], which provides that 'At any time before the entry of such final order of adoption, (at least six months after the interlocutory order) the court may revoke its interlocutory order for good cause, either of its own motion or on the motion' of the

agents of the department, the natural parents or the adoptive parents."

281 Ala. at 420-421, 203 So.2d 271.

While this case arises in the context of an effort by the natural father to set aside a judgment of the family court terminating his parental rights, the same rules should apply.

In this case, the Catholic Social Services Agency of Huntsville, through the actions of Ms. Dinwitty, must share much of the responsibility for the emotional trauma suffered by both the natural and the proposed adoptive parents. The carelessness with which rights so precious as these appear to have been handled is inexplicable. We regret any additional pain that any party must bear, but we must take the case as it is presented to us.

On remand to the family court, Matthew and Deborah Shuttleworth sought to determine

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through discovery the whereabouts of the child, including the identity of the proposed adoptive parents and any other person who has custody or control of the child. The Catholic Family Services Agency sought a protective order to prevent that discovery. The trial court denied the protective order and granted the motion for a disclosure. The Catholic Family Services Agency filed a petition for mandamus with the Court of Civil Appeals, which was granted on August 3, 1982, which had the effect of directing the family court to grant the protective order and thereby preserve the anonymity of the proposed adoptive parents. The Shuttleworths then filed this petition for mandamus in this Court.

[2] We hereby grant the petition and hold that the family court did not abuse its discretion in denying the protective

order sought by Catholic Family Services Agency. The natural parents, because of the peculiar facts of this case, are entitled to learn through discovery any information in the possession of the Catholic Social Services Agency which might bear on the issue of whether the father waived his parental rights and whether the representatives of that agency misinformed the court in that regard. Whether the disclosure of the identity of the proposed adoptive parents will be allowed is a matter within the family court's discretion in view of the peculiar facts of this case. Ordinarily, however, the identity of proposed adoptive parents is not discoverable in a proceeding to rescind an adoption or to set aside an order terminating parental rights. We simply hold that, in view of the peculiar handling of this case by the social agency involved, broad discovery

by the family court does not constitute an abuse of its discretion.

WRIT GRANTED.

JONES, ALMON, SHORES, EMBRY, BEATTY
and ADAMS, JJ., concur.

TORBERT, C.J., and FAULKNER, J., dissent.

TORBERT, Chief Justice (dissenting).

My disagreement with the majority centers on the proposition that permitting by discovery the disclosure of the identity of the adoptive parents is completely unnecessary to determine the validity, vel non, of the adoption proceedings.

This Court should recognize that the only issue is whether the adoption is valid. If it is not valid, then the natural parents are entitled to the custody of the child. That result would follow without regard to the identity of the adoptive parents or their relative fitness as parents. Conversely, if the adoption is valid, then the adoptive

parents are entitled to the custody of the child. This result would follow, again, without regard to the identity of the adoptive parents; the identity and relative fitness of the adoptive parents would be of no legal significance so far as the natural parents are concerned.

There is no need to disclose the adoptive parents' identity. To do so may well destroy their ability to function as parents of this particular child, even if the court ultimately upholds the adoption.

All the trial court needs to do is to determine whether there was a consent (or valid waiver) by the natural father sufficient to support the adoption (the natural mother's consent apparently being uncontroverted). The record before the Court in the first case showed that the natural father had in fact given his written consent to the adoption, but later

denied intending to consent. The trial court needs to make a ruling in this regard, and to do so it is not at all necessary to identify the adoptive parents.

The adoptive parents entered the parental relationship in reliance upon the promise that the state (with the Catholic Service Agency acting as the state's agent) would respect their anonymity. I think this Court and the trial court should respect that promise - especially when disclosure is not necessary to a determination of the ultimate issue.

The last sentence of this Court's earlier opinion stated: "The Family Court is also to determine if there has been a valid waiver of rights made by the petitioners." To make that determination, it is not necessary to disclose the adoptive parents' identity. If the trial court determines there was a waiver, then there would be no

legal consequence whatever to the natural parents, and they would be entitled to remain forever anonymous.

FAULKNER, J., concurs.

APPENDIX D

CASE ACTION SUMMARY

JUVENILE

Name:

Case Number:

Matthews, Mary Ann

JU-80-50402

Address:

Catholic Social Services

Filing Date: 3/11/80 Intake Off. Dunning

D.O.B. 1/1/80 Sex: F Race: W

Parents: Matthew Alan Shuttleworth
Deborah Ann Kelley aka
Deborah Ann Matthews

Attorney: Hon. John C. Fox, GAL, Child

Judge: Hon. G. Ross Bell

Prob. Off. Dunning Type Case: Termination

3-11-80: I hereby appoint Hon. John C.
Fox, as Guardian ad Litem, to
represent the interests of the
infant, Mary Ann Matthews, in
this case.

G. Ross Bell, Judge

This cause coming on for hearing and there being present in open court the petitioner and mother, Deborah Ann Kelley, also known as Deborah Ann Matthews, who is over the age of nineteen (19) years; Hon. John C. Fox, as Guardian ad Litem for the infant; Laura Dinwiddie, (sic) Social Worker with Catholic Social Services, and

It having been made to appear from the petition and from the evidence that said child was born out of wedlock and paternity has not been legally established it appearing that service has not been obtained on the putative father, and

It further appearing that the

mother is unable to provide a fit and suitable home for said infant and to provide for her future support, training and education, and therefore desires to be relieved of its cares and custody, all interested parties in open court having expressed consent and agreement that this be done, and

The Court having considered and understood the same, is of the opinion that it would be in the best interest of the future welfare of said child that the mother be relieved of its custody, and

The Court having found that said child is a dependent child under the age of eighteen (18)

years and in need of the care and protective supervision of this court, it is, accordingly,

ORDERED, ADJUDGED AND DECREED BY THE COURT that all parental rights which the mother, Deborah Ann Kelley, a/k/a Deborah Ann Matthews, has in or to the care and custody of said infant, Mary Ann Matthews, be and they are hereby terminated and severed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this cause be and is hereby continued to March 25, 1980, at 2:00 p.m., for the purpose of obtaining service on the putative father.

G. Ross Bell, Judge

3-25-80

This cause having been heard on March 11, 1980, at which

time the parental rights of the mother, Debroah (sic) Ann Kelley, also known as Deborah Ann Matthews, were terminated, and it being shown to the Court that service had not been obtained on the putative father, the case was continued to this date, and

This cause coming on for further hearing and there being present in open court Hon. Rizpah Morrow, as Guardian ad Litem for the infant; Laura L. Dinwiddie, (sic) Social Worker with Catholic Social Services, and

It having been made to appear to the Court that the putative father, Matthew Alan Shuttleworth,

does have knowledge of this hearing, has discussed the case with the social worker with Catholic Social Services indicating his consent, and having failed to appear, and

The Court having considered and understood the same, is of the opinion that it would be in the best interest of the future welfare of said child that the putative father be relieved of its custody, all interested parties in open court having expressed consent and agreement to the order herein made, it is, accordingly,

ORDERED, ADJUDGED AND DECREED BY THE COURT that all parental rights which the putative

father, Matthew Alan Shuttleworth has in or to the care and custody of said infant, Mary Ann Matthews, be and they are hereby terminated and severed, and the care, custody and control of said child is hereby committed to the Catholic Social Services for permanent placement or adoption.

Costs taxed in the amount of \$25.50 and are hereby suspended.

G. Ross Bell, Judge

6-10-80 MOTION FOR RELIEF FROM JUDGMENT
OR ORDER OF THE COURT TERMINATING
PARENTAL RIGHTS OF PLAINTIFFS
PURSUANT TO RULE 60(b), ARCP,
OR IN THE ALTERNATIVE, FOR
REVIEW UNDER THAT RULE, filed
by Hon. Joel E. Dillard,

Attorney for the mother and father of said child, filed this date and said Motion set for hearing on July 1, 1980, at 9:00 a.m.

7-1-80 On motion of the attorney for the Catholic Social Services and Laura L. Dinwiddie, (sic) this cause is hereby continued to July 21, 1980, at 2:00 p.m., as said attorney is committed to another court.

G. Ross Bell, Judge

7-21-80 This cause coming on for hearing on motion heretofore filed on behalf of the mother and putative father of the child, and there being present in open court the Guardian ad

Litem, Hon. John C. Fox; the mother and putative father, with their attorney, Hon. Joel Dillard; Laura Dinwiddie, (sic) Catholic Social Service with their attorney Hon. Larry Morgan, and

The Court having heard the sworn testimony taken in open court, including that of Beverly Batchum, Laura Dinwiddie, (sic) Hugh R. Shuttleworth and Matt Shuttleworth, and due to the lateness of the hour, this cause is hereby continued to August 4, 1980, at 10:00 a.m. for the purpose of taking additional testimony.

On motion of the attorney for the parents, IT IS HEREBY ORDERED, ADJUDGED AND DECREED

that no adoption proceedings shall be held concerning the said Mary Ann Matthews pending this hearing.

G. Ross Bell, Judge

8-14-80

This cause coming on for hearing on Motion for Relief from Judgment, pursuant to Rule 60(b) filed by the attorney for the mother and father, and there being present in open court on July 21, 1980, the mother and father with their attorney, Hon. Joel E. Dillard; Laura Dinwiddie (sic) with the Catholic Social Services with their attorney, Hon. Larry Morgan; Hon. John C. Fox as Guardian ad Litem for the child, and
The Court having taken the

sworn testimony in open court of witnesses Beverly Batchum, Laura Dinwiddie, (sic) Hugh R. Shuttleworth, Matt Shuttleworth, and the cause having been continued to August 4, 1980, for further testimony, at which time the same parties were present with their attorneys and the sworn testimony was taken in open court of Deborah Ann Kelley, Harold Kelley, Marie Shuttleworth, Betty Kelley, Etta Dunning, and Laura Dinwiddie, (sic) at which time this matter was taken under advisement and continued for the purpose of the attorneys filing Memorandum Brief and Arguments.

The Court having received

excellent and well prepared briefs and arguments and read and considered same and having reviewed the sworn testimony taken in open court, along with the many exhibits presented in open court finds as follows:

Matt Shuttleworth and Deborah Ann Kelley are over the age of nineteen (19) years and while college students they began to date. It is admitted by all parties that Deborah Ann Kelley (hereinafter called the mother) became pregnant in the early part of 1979 and that the father of said expected child was Matt Shuttleworth (hereinafter called the father). The mother and father discussed this

matter in August, 1979, and eventually the parents of both the mother and father were told the situation. The parents of the mother and the father were supportive in these discussions with them and various alternative actions were discussed. The father offered to marry the mother, but the mother refused the offer. On November 1, 1979, the mother and father proceeded to Atlanta with the mother's mother and father, and the father's mother, for the purpose of obtaining an abortion for the mother. The clinic they visited made certain tests and informed them that the mother was too far advanced in her

pregnancy and that an abortion could not be obtained. The following day, the mother, her mother, and girlfriend visited Catholic Social Services and discussed with Laura Dinwiddie, (sic) the caseworker employed by the Catholic Social Services, the possibility of placing the expected child for adoption.

There is much conflicting testimony as to the actual conversations that occurred then and later between Laura Dinwiddie, (sic) the mother, and her mother. The mother testified that Laura Dinwiddie (sic) told them that if the child was placed for adoption, the natural mother and father

would have the right to stop all proceedings and get the child back within one year after the proceedings commenced. The mother also testified that she informed Laura Dinwiddie (sic) that the father of the child had stated that he would not go along with the adoption effort and she was told that there were ways of getting around the father's refusal to cooperate. Laura Dinwiddie (sic) testified that she explained the adoption procedure and that after the child was placed for adoption there would be a year in which the agency would supervise the placement to make certain it was appro-

priate before the final decree. She denies that she stated the parents could get the child back anytime within a year. Laura Dinwiddie (sic) also testified that she informed them that in certain types of cases the father was not named, but if the father was named, he would have to be notified. She further testified that she told them it was not necessary for the father to sign consent papers in order for his parental rights to be terminated.

The child was born in Jackson, Tennessee on January 1, 1980, and the father was present at that time. At the hospital

the mother signed the papers necessary for the child to be removed from the hospital by Catholic Social Services and placed in foster care pending further efforts toward placing the child for adoption. Conversations and other contacts continued between the mother and Laura Dinwiddie (sic) concerning her efforts to have the child placed for adoption. The father did not have contact with the Catholic Social Services or had seen the child since its birth. The father testified that he never agreed with the mother's decision to place the child for adoption nor

did he make any effort to stop the procedure because of his concern for the mother's physical and emotional wellbeing. The mother testified that throughout this period she was under the influence of Laura Dinwiddie (sic) and dependent upon her for advise (sic) and counsel. She also testified that she was not well, physcially or emotionally. Although she persisted in her efforts to have the child placed for adoption, she testified she still felt that she would be able to change her mind later and get the child back within one year after the adoption proceedings were commenced.

At the request of the mother, the agency contacted this court and forwarded necessary preliminary material to file a petition requesting that parental rights to the child be terminated. On March 11, 1980, the mother, with her mother, came to Birmingham where they met with Laura Dinwiddie (sic) and proceeded to this court. A petition had been prepared for the mother to file, and this petition was shown to the mother and her mother with the request that they read and understand before signing. The mother read the petition and said that she understood the petition,

and she signed the petition before court personnel. She was also shown an affidavit which stated her desires to voluntarily have her parental rights terminated and after reading and stating that she understood the paper, she signed and acknowledged before a Notary Public. She appeared before the Judge of this Court in the company of her mother, Laura Dinwiddie, (sic) The Honorable John C. Fox, who had been appointed as Guardian ad Litem for the infant, and the Intake worker connected with this court. She was again asked by the Court if she understood the nature of the

proceedings and if this was what she wanted to do. She responded in the affirmative and The Court entered an order terminating her parental rights and continued the case to March 25, 1980, for the purpose of obtaining service on the father.

A notice was sent on that day to the father at his address in Decatur, Alabama. The letter was delivered to the address and Hugh R. Shuttleworth, the father signed the receipt for said letter. The letter was placed in the father's room and he was informed that the letter had arrived. The father testified

that he did receive the letter, that he knew it was addressed to him, and that it was from this court. He further testified that he did not open the letter but did discuss the letter with the mother. She told him the letter was a notice of the hearing held on March 25, 1980, concerning his parental rights and papers for him to sign. He told her that he would not sign any papers and should get a lawyer to fight the matter but that he would not participate in any proceeding to remove his parental rights.

The mother contacted Laura Dinwiddie (sic) on March 21, 1980, and told her that the

father would come in and sign the paper which the court had sent him agreeing to the termination of his parental rights. The appointment was not kept and the mother called and said that they would be in the morning of March 25, 1980, with the paper; however, that appointment also was not kept. The mother did bring to the Catholic Social Services office and deliver to Laura Dinwiddie (sic) the signed paper on March 28, 1980. The father testified that he did not know what the paper said, that he signed it only because the mother informed him that it was necessary to keep the

matter confidential. The father failed to appear in Court on March 25, 1980, at which time an order was entered terminating his parental rights.

The mother and father testified that they were in continuous contact and conversations about this situation. In May, they came to the conclusion that they wanted to get the child back. The grandparents of the child have backed them in their decisions in the past and are rendering every possible support they can in the present, with the promise to do so in the future. They contacted Laura Dinwiddie (sic) with the

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request that the child be returned to them and she informed them that the child had already been placed for adoption and she was unable to return the child.

This is the type case that causes judges to have restless nights. In order to successfully place a child for adoption there must be a final termination of parental rights. If there is any uncertainty or equivocation on the part of the parent, the step certainly should not be taken. Every effort is made to ascertain that any person who is relinquishing their parental rights in order that their

child may be placed for adoption understands what he or she is doing and is doing it voluntarily. The problems which would result in having to remove a child who has been placed for adoption after the proposed adoptive parents have formed an attachment to the child and after the child has become accustomed to its new home and parents could be traumatic to all parties. In all matters concerning a minor child in this court, the goal is to keep ever in mind the present and future welfare and interest of the child.

This is not a hearing concerning a custody controversy.

It is a hearing on a motion to seek relief from the orders of this court entered on March 11, 1980 and March 25, 1980. In such a hearing, under Rule 60(b) of the Alabama Rules of Civil Procedure, the Court is given wide discretion. It has the duty to balance the interest of the parties involved. If an injustice has resulted, The Court must take into consideration the need for finality of judgments. Where many persons have relied on the judgment in good faith, they also must be considered. The burden is on the petitioner to show good cause for having failed to take appropriate action sooner

and prevented any resultant injury to others who have relied on the judgment. In this particular case, it is obvious that the young parents have reached a decision to change a procedure that was commenced and pursued by the mother and not formally objected to by the father. They seek to explain their failure to take appropriate action sooner by their misunderstanding, lack of knowledge, or being under the undue influence and fraudulent statements of the agency worker. The agency denies any fraudulent statements or undue influence on the mother.

It contends that it has acted in good faith and if there was misunderstanding on the part of the parents, it was not intentionally done. It also contends that acting upon the orders of this court they have placed the child for adoption. It is obvious that the proposed adoptive parents have acted in good faith and have taken a child in their home to be adopted. The Court is well aware that regardless of its decision, there will be much sadness concerning the placement of this child. The Court is of the opinion that if such sadness must exist, the ones who allowed it to come into

existence must be the ones to shoulder that burden.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Motion for Relief from Judgment or Order of The Court Terminating Parental Rights should be and is hereby denied.

G. Ross Bell, Judge

8-18-80

It being shown to the Court than an appeal has been filed in this cause, along with a Motion to Continue Stay during Pendency of Appeal, in which the parents attorney, Hon. Joel E. Dillard, moves for an order from this court continuing its stay of adoption proceedings during the pendency of the appeal, and

The Court having heard the arguments of the attorneys is of the opinion that the motion should be and is hereby denied.

G. Ross Bell, Judge

- 8-15-80 Written Notice of Appeal
filed to the Circuit Court of
Appeals this date.
- 12-12-80 Order confirming trial's
court decision filed this date.
(Civil Court of Appeals)
- 10-2-81 Order of the Supreme Court
of Alabama, Reverse, Remanded
with Directions.
- 10-7-81 Motion for Expedited Hearing
on Remand filed by Hon. Joel
Dillard, attorney for the
natural parents. Motion set
for hearing on March 19, 1982,
at 10:30 a.m.

- 10-7-81 Motion to Require Disclosure
of the Names and Addresses of
Any and All Parties Maintaining
Custody, Control and/or
Possession of Mary Ann Kelley,
filed by Hon. Joel Dillard,
attorney for the natural parents.
Motion set for hearing March
19, 1982 at 10:30 a.m.
- 10-22-81 Response to Motion for
Expedited Hearing on Remand
filed by Hon. Susan M. Tuggle,
attorney for Catholic Family
Services.
- 2-5-82 Application for Rehearing
Overruled, Alabama Supreme
Court.
- 2-24-82 Order Reverse and Remanding
with Instruction, Court of
Civil Appeals.

- 2-26-82 Motion for a Protective Order
with "Exhibit A" filed by Hon.
Susan M. Tuggle, attorney for
Catholic Family Services. Motion
set for hearing on March 19,
1982, at 10:30 a.m.
- 2-26-82 Motion for Request for a
Pre-Trial Hearing filed by
Hon. Susan M. Tuggle, attorney
for Catholic Family Services.
Motion set for hearing on
March 19, 1982, at 10:30 a.m.
- 3-19-82 This cause coming on as a
pre-trial hearing on numerous
motions previously filed in this
matter and there being present
in chambers Honorable Joel E.
Dillard, attorney for petitioners;
Honorable Susan Tuggle, attorney
for the respondents; Honorable

John Fox, as Guardian ad Litem for the child, and

After hearing the statements and arguments of the attorneys, the Court, by consent of all present, takes this matter under advisement in order that it may contact the Alabama Supreme Court to determine the possibility of a clarification by the Alabama Supreme Court of its opinion dated October 2, 1981, and report back to the attorneys.

Decision concerning all previously filed motions are withheld pending this case being under advisement.

G. Ross Bell, Judge

3-19-82

Motion to Recuse filed this

date by Honorable Joel Dillard,
attorney for petitioners.

3-23-82

Pursuant to the order dated
March 19, 1982, the Court has
contacted by telephone Mr. J.
O. Sentell, Clerk of the
Supreme Court of Alabama, to
determine the possibility of
a clarification of the Supreme
Court's opinion dated October
2, 1981, and has been informed
that there will be no further
clarification by the Supreme
Court of its said opinion, and
the Court has so informed the
attorneys.

It further being shown to the
Court that a Motion to Recuse
has been filed by the petitioners
in this matter, and the Court

being of the opinion that it should be granted, it is, therefore,

ORDERED, ADJUDGED AND DECREED that the Judge and the Guardian ad Litem be and are hereby recused in this matter, and that the Presiding Judge of the Tenth Judicial Circuit be requested to assign another Judge to preside over the hearing required by the said opinion of the Supreme Court.

G. Ross Bell, Judge

10-20-82 At a Pre-Trial Hearing this date in which all parties were represented, the Court set December 6, 1982, at 10:00 a.m. for a trial in this cause.

The only issue to be heard

on that date is the question of service and waiver of service.

No discovery will be allowed until permission is granted by the Court. No discovery will be allowed from now until the date of this trial on December 6, 1982.

It is the opinion of this court that this order complies with the latest Supreme Court decision on a Petition for Writ of Mandamus in this case and dated August 16, 1982.

Charles M. Nice, Judge

11-3-82

Motion for Intervention, filed by Honorable Jim Beech on the 16th day of September, 1982, is hereby granted.

Charles M. Nice, Judge

1/12/83

This cause having been heard for two days on December 6 and 9, 1982, and there was present in open court Hon. Robert Sutton as Guardian ad Litem for the child; the parents, Matthew and Deborah Shuttleworth, with their attorney, Hon. Joel Dillard; Laura Dinwiddie, (sic) Catholic Social Services, with their attorney, Hon. Susan Tuggle; Hon. James L. Beech, attorney for the unidentified adoptive parents who were not present, and

The Court having heard the sworn testimony in open court including that of H.R. Shuttleworth, Mrs. H.R. Shuttleworth, Bobbie Shuttleworth,

Etta Dunning, Betty Kelley,
Harold Kelley, Deborah Shuttle-
worth, Matthew Shuttleworth,
Judy Johnson, Laura Dinwiddie
(sic), and

After hearing the evidence,
the arguments of the attorneys,
reading the depositions and
briefs filed by the parties,
all of which having been
considered, this Court finds
as follows:

The facts of this case have
been set out in the opinions
of the Court of Civil Appeals
of Alabama, 410 So. 2d 894,
and the Supreme Court of
Alabama, 410 So. 2d 896.

The Supreme Court of Alabama
held that the critical question
was whether a parent is

entitled to notice prior to the revocation of any parental rights he may have. The court cited Rule 13, Alabama Rules of Juvenile Procedure and Rule 4.1(c)(2) regarding service and held that said Rule 4.1(c)(2) must be strictly complied with. The Supreme Court found that said provisions "were not complied with" in this case. Said court reversed the Court of Civil Appeals which had affirmed Judge G. Ross Bell's decision of March 25, 1980, terminating the father's parental rights and placing the child with the Catholic Social Services for adoption.

The cause was ordered remanded to the Family Court of Jefferson County to determine the parental rights of the petitioners and to determine if there had been a valid waiver of rights made by the petitioners.

Then again in the case before the Supreme Court of Alabama, Special Term 1982; Ex parte: Charles Nice, Circuit Judge, Petition for Writ of Mandamus, In Re: In the Matter of Mary Ann Kelley, et al v. Licensed Foster Parents, the court repeated its previous decision that the unwed father was entitled to notice that he had not been afforded proper notice in that Rule 4.1(c)(2) Alabama Rules of Civil Procedure was

not complied with. The Supreme Court directed the cause to the Family Court of Jefferson County for a determination of whether the father waived his parental rights.

In his dissent the Chief Justice stated that "all the trial court needs to do is to determine whether there was a consent (or valid service) by the natural father sufficient to support the adoption." (fn 1)

The mother's consent to support the adoption is unquestioned. She had previously sought an abortion of this unborn child but was found by the doctors to have been too far into her pregnancy. On

March 11, 1980, she signed an affidavit requesting the "the court to terminate all my parental rights in and to the custody of this child in order that an adoptive placement might be made."

The father's behavior and actions from the time the mother first indicated her desire for an abortion until after his rights were terminated on March 25, 1980, are a study in ambivalence and indecisiveness. Time after time the father had the opportunity, had he so desired, to stop the proceedings toward the termination of his parental rights. He consistently

vacillated or remained mute when he should have been forthright, outspoken, even obtrusive and vociferous with his intentions on such an important matter.

Matthew Shuttleworth and his mother journeyed with Deborah Kelley and her parents to Atlanta, Georgia on November 1, 1979, to see a doctor about an abortion for Deborah. Deborah had told Matthew that she had contacted the Catholic Social Services and Laura Dinwiddie (sic) before the child's birth on November 2, 1979, and wanted to place the child for adoption.

The child was born on January 1, 1980. Matthew knew that

Laura Dinwiddie picked up the child at the hospital on January 4, 1980, for the purpose of adoptive placement. Not until almost six months later did Matthew contact the Catholic Social Services, and he never contacted this court.

Deborah told Matthew that he had rights over the child and Matthew stated he was going to get a lawyer and fight. He knew that Deborah went to court on March 11, 1980, and that her parental rights were terminated.

Matthew's father signed for the letter from the Family County of Jefferson County on March 13, 1980. Matthew

received the court letter on March 13, 14, or 15, 1980, and turned the letter over to Deborah. She told him it concerned his court hearing which was to be held in two weeks. But the letter was placed in Deborah's glove compartment of her car and it remained there until March 21st or March 28th, at which time the letter was voluntarily signed by Matthew and turned over to Laura Dinwiddie (sic) of the Catholic Social Services.

It is uncontroverted that Matthew voluntarily signed the document which constituted a waiver of his rights. Although the paper was not notarized,

it is inconceivable that Matthew, a college student, did not know what he was signing.

Matthew's excuses that he did not read the document on one of these dates because he might be late for a cosmetology class, and that he believed the document was for "confidentiality" purposes were anemic and lacked credence. In fact, much of his testimony appeared disingenuous.

The Court finds under Matthew Shuttleworth's testimony and the undisputed evidence, that prior to the hearing, he received from this court and possessed a document fully disclosing the nature of the

proceeding, the time and place of the hearing and his right to counsel. It was his sole decision not to open it, if in fact he did not.

The Court further finds that he knew Deborah had been to this court on March 11, 1980, concerning the adoption of the child and on March 12, 1980, the child's mother had informed him there would be a hearing on March 25, 1980, in this court about terminating his parental rights. He received the registered letter from this court on March 13, 14, or 15, 1980. He was informed that it pertained to termination of his rights. He was given the

name and whereabouts of the Judge handling the case prior to the hearing.

That by his action and his conduct he clearly waived his rights.

All the parties were at all times residents of Alabama and the fact that the child was born in Tennessee is immaterial.

This Court after seeing and hearing Matthew Shuttleworth testify, together with the other testimony received is convinced that the father's acquiescence amounted to a waiver of his rights and that he in effect consented to the termination of his rights to the child.

The Court finds that under

all the evidence heard in open court, most of which is undisputed, that the father received service from the court that was more than sufficient to satisfy all constitutional rights to notice and due process, and that it is for the welfare and in the best interest of the innocent child that this long tragic court proceeding be ended.

Therefore, This Court finds that all parental rights which the father, Matthew Alan Shuttleworth has in or to the care and custody of said child, Mary Ann (Matthews) Kelley, be and they are hereby terminated, that the best interest of said

child require it to remain in the custody of the adoptive parents, and that the petition filed under Rule 60(b), Alabama Rules of Civil Procedure, should be and is hereby denied.

Charles M. Nice, Judge

fn.1

The Chief Justice dissented on the question of whether discovery should be allowed to permit disclosure of the identity of the adoptive parents.

Although the Family Court was granted the right to allow this disclosure, the Family Court denied petitioner's motion for discovery believing disclosure to be unnecessary.

3-30-83

This cause coming on for hearing on Motion to Supplement

Record, filed by Honorable
Joel E. Dillard, and there being
present in open court
Honorable Susan Tuggle; Honorable
James Beech; Honorable Joel
Dillard; Honorable C. Cole as
Guardian ad Litem for the child,
and

The Court having heard arguments
of the attorneys, hereby grants
the Motion to Supplement
Record.

Charles M. Nice, Judge

APPENDIX E

Law Offices

Tweedy, Jackson and Beech

First National Bank Bldg.

P. O. Box 748

Jasper, Alabama 35501

Charles E. Tweedy, Jr.

Jim Beech

Harvey Jackson, Jr.

Edward R. Jackson

Area Code 205

384-8624

384-4364

387-2171

July 19, 1982

Judge Charlie M. Nice
Family Court
716 21st Street
Birmingham, Alabama 35203

RE: Shuttleworth Case

Dear Judge Nice:

Susan Tuggle who has been representing Catholic Family Services has forwarded me a request by L.S. Jones III in regard to meeting with the adoptive parents.

Of course, it is my strongest desire that the anonymity of the adoptive parents be maintained for as long as it is possible because I feel to place the child in a

situation which would result in a traumatic confrontation would be very detrimental.

It is my understanding that you may have some concern in regard to the adoptive parents and I would appreciate very much the opportunity to have a private meeting with you and with these parents so that you yourself will have an opportunity to observe them because they are truly outstanding people in my judgment.

Should you feel that the guardian ad litem should participate in this meeting of course that will be done. I would appreciate their names remaining anonymous (sic) if this is agreeable with you. This meeting will be at your convenience at any time and under any circumstances

-E-3-

that you would suggest in this case.

Yours very truly,

TWEEDY, JACKSON & BEECH

Jim Beech

JB/bmh

The Legal Clinic And Law Offices Of
~~XXXXXX~~ RODENHAUSER, & TUGGLE, P.C.

704 Franklin Street

Huntsville, Alabama 35601

Attorney At Law

~~XXXXXXXXXX~~

James S. Rodenhauser
Susan M. Tuggle

Telephone

(205) 934-3511

July 12, 1982

Mr. Loring S. Jones
Suite 107 Colonial Center
1009 Montgomery Highway, South
Vestavia Hills, Alabama 35216

RE: Shuttleworth, Case No. JU80-50402

File No. K10298

Dear Loring:

Let me apoligiza (sic) for the delay in
getting back in touch with you in regard
to the above styled matter. The adopting
parents have sought representation, for they

felt that sooner or later they would be involved in this litigation. I have been in contact with their attorney, and it is his opinion that he does not feel that it is in the best interest of the adopting parents to allow their anonymity to be revealed even to you at this point in time. I have communicated with him, and I feel sure that he will communicate with Judge Nice and file whatever motions he may feel are necessary for the protection of the adopting parents. I apologize in that I must have led you to believe that I had no problem and that no problem potentially existed with your visiting and talking with the adopting parents. At the point in time when I initially communicated that to you, I frankly did not have any problem, for I have met the adopting

parents and know them to be competent and extremely good parents. Reviewing the case with their attorney though, I have changed my mind in that this meeting is definitely going to cause a lot of emotional turmoil with them, a situation that their attorney and I want to avoid at all costs. They have been through these emotionally exhausting months of not knowing whether or not the child is going to stay with them, and I feel that if you met with them at this point, we would be signalling defeat. I do not feel that we need to proceed with this interview until the Petition for Writ of Mandamus has been ruled upon one way or the way.

-E-7-

Mr. Loring S. Jones, III

July 12, 1982

Page 2

Again, I sincerely apologize for any misunderstanding that may have developed. Thank you for your kind attention and cooperation.

Sincerely yours,

THE LEGAL CLINIC & LAW OFFICES OF
RODENHAUSER & TUGGLE, P.C.

Susan M. Tuggle

SMT/sr

cc: Judge Nice

APPENDIX F

§ 23-10-3. Requirements As To Consent of Parents, etc.

No adoption of a minor child shall be permitted without the consent of his parents, but the consent of a parent who has abandoned the child, who cannot be found, who is insane or otherwise incapacitated from giving such consent or who has lost guardianship of the child through divorce proceedings or by the order of a court having jurisdiction may be dispensed with, and consent may be given by the guardian, if there is one, or if there is no guardian, by the state department of pensions and security. In every such case, the court shall cause such further notice to be given to the known kindred of the child as shall appear to be just and practicable. In case of illegitimacy, the consent of the

mother alone shall suffice, except where paternity has been established. In all cases where the child is over 14 years old, his own consent must be had also. (Acts 1931, No. 405, p. 504; Code 1940, T. 27, § 3.)

§ 12-15-63. Notification Of Children, Parents, Guardians, etc., Of Right To Counsel; Appointment Of Counsel By Court.

(a) In delinquency and in need of supervision cases, a child and his parents, guardian or custodian shall be advised by the court or its representatives at intake that the child has the right to be represented at all stages of the proceedings by counsel retained by them or, if they are unable to afford counsel, by counsel appointed by the court.

If counsel is not retained for the child in a proceeding in which there is

a reasonable likelihood such may result in a commitment to an institution in which the freedom of the child is curtailed, counsel shall be appointed for the child.

The court may appoint counsel in any case when it deems such in the interest of justice.

(b) In dependency cases, the parents, guardian or custodian shall be informed of their right to be represented by counsel and, upon request, counsel shall be appointed where the parties are unable for financial reasons to retain their own.

The court shall also appoint counsel for the child in dependency cases where there is an adverse interest between parent and child or where the parent is an unmarried minor or is married, widowed, widowed or divorced and under the age

of 18 years or counsel is otherwise
required in the interests of justice.

(Acts 1975, No. 1205, § 5-124.)

§ 12-15-65. Conduct Of Hearings And
Disposition Of Cases Generally.

(a) Hearings under this chapter shall be conducted by the court without a jury and separate from other proceedings. The general public shall be excluded from delinquency, in need of supervision or dependency hearings and only the parties, their counsel, witnesses and other persons requested by a party shall be admitted. Such other persons as the court finds to have a proper interest in the case or in the work of the court may be admitted by the court on condition that such persons refrain from divulging any information which would identify the child or family involved. If the court finds that it is in the best interest of the child, his presence may be temporarily excluded from the hearings, except while allegations of delinquency or in need of

supervision are being heard.

(b) The parties shall be advised of their rights under law in their first appearance at intake and before the court. They shall be informed of the specific allegations in the petition and given an opportunity to admit or deny such allegations.

(c) If the allegations are denied, the court shall proceed to hear evidence on the petition. The court shall record its findings on whether or not the child is a dependent child or, if the petition alleges delinquency or in need of supervision, as to whether or not the acts ascribed to the child were committed by him. If the court finds that the allegations in the petition have not been established, it shall dismiss the petition and order the child discharged from any detention or temporary care

theretofore ordered in the proceeding.

(d) If the court finds on proof beyond a reasonable doubt, based upon competent, material and relevant evidence, that a child committed the acts by reason of which he is alleged to be delinquent or in need of supervision it may proceed immediately to hear evidence as to whether the child is in need of care or rehabilitation and to file its findings thereon. In the absence of evidence to the contrary, evidence of the commission of an act which constitutes a felony is sufficient to sustain a finding that the child is not in need of care or rehabilitation, it shall dismiss the proceedings and discharge the child from any detention or other temporary care theretofore ordered.

(e) If the court finds from clear

and convincing evidence, competent, material and relevant in nature, that the child is dependent and in need of care or supervision or from clear and convincing evidence, competent, relevant and material in nature, that the child is in need of care or rehabilitation as a delinquent child or child in need of supervision, the court may proceed immediately, in the absence of objection showing good cause or at a postponed hearing, to make proper disposition of the case.

(f) In disposition hearings all relevant and material evidence helpful in determining the questions presented, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value, even though not competent in a hearing

on the petition. The parties or their counsel shall be afforded an opportunity to examine and controvert written reports so received and to cross-examine individuals making reports.

(g) On its own motion or that of a party, the court may continue the disposition hearing under this section for a reasonable period to receive reports and other evidence bearing on the disposition or need for care or rehabilitation. In this event, the court shall make an appropriate order for detention or temporary care of the child or his release from detention or temporary care during the period of the continuance subject to such conditions as the court may impose. (Acts 1975, No. 1205, § 5-128.)

REGULATION XIII - 7(IV)
STATE OF ALABAMA
DEPARTMENT OF PENSIONS AND SECURITIES

Refer to Family and Children's Services Manual, Volume I, Chapter VII, Protective Services for Children, for procedures concerning custody of children.

Particular factors to be noted for children who are to be committed to the permanent custody of the State Department of Pensions and Security are as follows:

1. A copy of the written summary prepared for the court by the County Department is to be sent to the State Department when the child is committed.
2. The child's name in the complaint, petition and order must be consistent with the birth certificate. Inconsistencies are to be considered with the Division of Adoption

before the hearing if there are problems in correcting. (See Item 5.b., pages XIII-4 and XIII-5, in this Chapter)

3. Correct names and addresses of persons who should receive summons to the hearing must be included in the petitioner.
4. A guardian ad litem who is an attorney must be present at the hearing to represent each child for whom the Department is seeking or is to receive permanent custody. (See Family and Children Services Manual, Volume I, Chapter VII, Protective Services, pages VII-22 and VII 26)
5. A guardian ad litem who is an attorney must be present at the hearing to represent the minor

parent(s) of a child when the Department is seeking or is to receive permanent custody. Payment is to be authorized only when the judge has determined that the parents are not able to pay for such services. (See Family and Children's Services Manual, Volume I, Chapter VII, Protective Services, page VII-26)

6. A guardian ad litem who is an attorney must be present to represent the parent of a child when the Department is seeking or is to receive permanent custody if the parent is mentally incapacitated as determined by a court, licensed practicing physician or a mental health clinic. Payment is to be autho-

rized only when the judge has determined that the parents are not able to pay for such services.

(See Family and Children's Services Manual, Volume I, Chapter VII, Protective Services, pages VII-26)

7. The following items are to be included in the Court Order:
 - a. Statement as to the presence of an attorney who represented the child as guardian ad litem.
 - b. Statement that summons was issued to all parties pursuant to law and rules of the court.
 - c. Facts that show that the child is being subjected to physical or emotional harm or threatened harm,

or that the child is destitute, homeless; or is dependent on the public for support; or the child is without parent or guardian able to provide for his support, training and education; or the child is the subject of controversy; and

- d. Facts which show that less drastic measures than termination of parental rights have been unavailing.

REGULATION XIV-II (VII)
STATE OF ALABAMA
DEPARTMENT OF PENSIONS AND SECURITIES

Children Brought Into the State For
the Purpose of Adoption.

When a child is to be brought into

the state of Alabama for the purpose of adoption the following requirements must be met:

1. The sending state should prepare Form ICPC-100 A, Request to Place Child in quadruplicate and send it to the Bureau of Family and Children's Services, Division of Adoption.
2. The sending agency should send in triplicate case material on the child to be placed to the compact administrator in that state. Information should include social and medical information about the family. The natural parents of the child should be interviewed by a representative of a social agency. Birth verification and

medical report should be included for the child.

3. Court documents should be included. The sending state should send court termination orders or copies of relinquishment in instances where there was not a court termination of parental rights.
4. When the above information is received in the Bureau of Family and Children's Services, the County Department will be requested to make a home study of the prospective adoptive parents if this has not already been completed. (See Guide for the Home Study and Placement Evaluation in Section III). The County Department will make a recommendation to the Bureau of Family and Children's

Services, Division of Adoption, as to the suitability of the home for placement of the child. When requested by the sending state, the request for a study may be sent to a licensed child placing agency.

5. The Bureau of Family and Children's Services will review the recommendation of the County Department or licensed child placing agency and if concurrence in the planning can be given, the Bureau of Family and Children's Services will write the compact administrator in the sending state giving approval or disapproval of the placement.

REGULATION XIV-2 (I)
STATE OF ALABAMA
DEPARTMENT OF PENSIONS AND SECURITIES

Finding a suitable home for a child who has lost or never had a home is a problem with many facets. When a child must remain away from the home of his parents, relative resources, appropriate foster care or adoption may be needed as a plan. (For information on formulating an appropriate placement plan refer to Chapter XI, Foster Care, Chapter XII, Adoption, Chapter XIII, Termination of Parental Rights.) These placement resources may be located outside the state of Alabama and appropriate Interstate Placement Procedures must then be followed.

The Alabama Department of Pensions and Security has been given the legal duty and responsibility to provide homes

for dependent and neglected children since the Department was first established. Code of Alabama 1975, Section 38-2-6 (14) provides, in pertinent part, that it shall be the duty and responsibility of the Department of Pensions and Security to "receive and care for dependent or neglected minor children committed to its care . . . and place such children in family homes or in approved suitable institutions operating in accordance with the provisions of this title and supervise such child however placed."

The placement of children from other states into Alabama has been regulated through a provision in the Child Care Act of 1971, now codified as Code of Alabama 1975. Section 38-7-15. This section provides that no person or agency shall bring or send any child

into the state of Alabama for the purpose of placing him or procuring his adoption or placing him in any child care facility as defined in the Child Care Act without first obtaining the consent of the Department of Pensions and Security.

Act No. 79-675, passed by the 1979 Regular Session of the Alabama Legislature, enacts the Interstate Compact on The Placement of Children and enters Alabama into this Compact with all other jurisdictions legally joined therein. (Act No. 79-675 will be recodified as Code of Alabama 1975, Section 44-2-8 through Section 44-2-14.) This compact governs both children being brought in and children going out of state, but is binding only in those states which are members of the compact. (All states except Hawaii, Michigan, Nevada, New Jersey and South

Carolina are now participants. The District of Columbia, Puerto Rico and Virgin Islands are non-compact territories, according to the Compact Administrators' Manual on the Interstate Compact on the Placement of Children, as revised May, 1978.)

Article I of the Interstate Compact on the Placement of Children provides the following:

"It is the purpose and policy of the party states to cooperate with each other in the interstate placement of children to the end that:

(a) Each child requiring placement shall receive the maximum opportunity to be placed in a suitable environment and with persons or institutions having appropriate qualifications and facilities to provide a necessary and

desirable degree and type of care.

(b) The appropriate authorities in a state where a child is to be placed may have full opportunity to ascertain the circumstances of the proposed placement, thereby promoting full compliance with applicable requirements for the protection of the child.

(c) The proper authorities of the state from which the placement is made may obtain the most complete information on the basis of which to evaluate a projected placement before it is made.

(d) Appropriate jurisdictional arrangements for the care of children will be promoted."

REGULATION XII-23
STATE OF ALABAMA
DEPARTMENT OF PENSIONS AND SECURITIES

The United States Supreme Court ruled in the case of Stanley v. Illinois, 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972) that the unwed father had a right to be heard in a case where rights, duties and obligations with respect to his child are being judicially determined. Consideration should be given to this question in preparing to make the first report to the Court.

It is important to discuss with the unwed mother her relationship with the father, whether he has maintained a home with her and appeared to accept the role of father, whether he has exercised some act or acts that make it appear he is acknowledging the child as his own or whether he has legally acknowledged

paternity. The facts and by whom they were reported should be reflected in the report and the statement made that the father's consent is or is not on file.

Act No. 79-820, effective August 9, 1979 provides that:

In case of illegitimacy, where parental rights have not been terminated by order of a juvenile court or court of like jurisdiction, the consent of the mother alone shall suffice, except that the unwed father shall be given notice of the adoption proceedings and opportunity to be heard (1) where paternity has been established, or (2) where the name and address of the unwed father is shown on the petition, or (3) where the name and address of the father is otherwise known to the court.

The court may wish to have information

directly from the mother in order to determine whether the unwed father's consent to the adoption is necessary. The court may also wish to have the agency interview the unwed father, and in that case, a supplementary report including pertinent information may be indicated.

The principles of good casework should be applied here as in any other aspect of the adoption study. Care should be exercised to protect the unwed mother, the unwed father, the child, the adoptive parents and any other family members who might be affected.

If consent of the unwed father is filed, he should be contacted for the same type of information as would be needed concerning the father who is married to the mother of the child.

Except for children placed by the Department or by a licensed child placing agency, the petitioners or their attorney have responsibility to obtain the consent to adoption.

It is the court's responsibility to determine any question as to validity of consent. It is the agency's responsibility to point out the facts concerning consent.

REGULATION XII-30
STATE OF ALABAMA
DEPARTMENT OF PENSIONS AND SECURITIES

The natural parents should be contacted by the worker as it is from them that information about family background, why the child was surrendered, and whether they are satisfied with the arrangements can best be obtained. In approaching a natural parent or relative, the worker should aim toward creating an atmosphere

conducive to free expression of true wishes about the child and to giving family history in the best interest of the child.

Just as is true with the adoptive parents, the natural parents may not be aware of the agency's role. Therefore, the worker, in anticipation of some of their feelings, should be prepared to be understanding and be sensitive to the following:

1. Many times natural parents have had no indication that a social study is necessary. (Instead they may have been attempting to avoid this in arranging the independent placement.) Attempts should be made to alleviate fears, guilt, resentment, etc. with an accepting approach.
2. The natural parents should be

told why the worker is there, the kind of information needed and the way it will help, and the respective functions of the agency and the court.

3. The natural parents should freely participate in the process to provide a valid picture of the child, present their true attitudes toward adoption, and give significant facts. Natural parents' motivation in giving up the child is very important. What were the circumstances and is the parent sufficiently satisfied with the placement not to interfere in the future?

APPENDIX G

THE STATE OF ALABAMA -- JUDICIAL
DEPARTMENT
COURT OF CIVIL APPEALS OF ALABAMA
CIV. 2468

December 10, 1980

Rehearing Denied January 21, 1981

In the Matter of

Mary Ann (Matthews) Kelley,
Matthew Alan Shuttleworth, Father
Deborah Ann Kelley, Mother

v.

Licensed Foster Parents et al.

This case comes before us on the denial of a Rule 60(b) motion from the Family Court of Jefferson County.

The record reveals the following:

A baby girl was born to Deborah Ann Kelley and Matthew Alan Shuttleworth on January 1, 1980. The mother and father were not at that time, nor have they ever been, married.

Shuttleworth has never denied being the child's father and, in fact, freely admits his paternity. Both mother and father are twenty-one years old.

Having been made aware in November 1979 that her pregnancy had progressed too far to obtain an abortion, the mother sought to place her soon-to-be-born child for adoption. It appears that the father was opposed to abortion or adoption from the outset.

The mother consulted a social worker, representing Catholic Social Services of Huntsville, concerning giving up of the child at birth for adoption. The father was not involved in these consultations. The mother signed a notarized statement giving consent to place the child for adoption. The case was begun pursuant to Rule 12, Alabama Rules of Juvenile Procedure, and a hearing was set pursuant to

§12-15-65, Code of Alabama. The hearing was held on March 11, 1980, with the mother, but not the father, present. An order was entered finding the child dependent and terminating the parental rights of the mother. Hearing as to a disposition of the father's parental rights was postponed until March 25, 1980. The father did not appear. Judgment was entered terminating his parental rights.

The mother and father failed to appeal the judgments terminating their rights within forty-two days as provided by Rule 4, ARAP. Instead, they obtained counsel after time for appeal had run and jointly moved pursuant to Rule 60(b), ARCP, for relief from judgment on June 10, 1980.

The Court heard more than four hundred pages of testimony on that motion. We

have reviewed the record carefully.

[1] There were alleged as grounds in the motion that there was practiced upon the mother of the child fraud, undue influence, and misrepresentation to secure her relinquishment of parental rights to her child and consent to its adoption. We have carefully considered the record and find no basis for disagreement with the trial court's factual conclusion that none of those allegations were supported by the evidence.

[2] The motion further charged improper service of notice of the hearing of March 25, 1980, upon the father. The record reveals that notice of the hearing, together with an instrument prepared for his signature releasing his rights, was sent by certified mail, restricted delivery, to the father's address. The record further reveals that the notice was

delivered to that address and receipt therefor signed by the addressee's father, as agent, on March 13, 1980.

Section 12-15-54, Code of Alabama (1975) provides that service of summons in such cases shall be pursuant to the rules of procedure adopted by the Supreme Court. Rule 13, Juvenile Rules provides that service of summons shall be as provided in Alabama Rules of Civil Procedure. Those rules provide for service by certified mail, restricted delivery. The comment to Rule 4.1(c)(2), ARCP states:

Restricted delivery provides a means by which a mailer may direct that delivery be made only to the addressee or to an agent of the addressee who has been specifically authorized in writing by the addressee to receive his mail.

There is no proof of written authority by the addressee, Shuttleworth, for his father to receive his mail at his father's

home. It is undisputed, in fact admitted, that the letter was placed in his room and he noted that it was from the court. He subsequently carried it to the child's mother and discussed with her his continued resolve not to give up his rights to his daughter. The father admitted that he, in fact, affixed his signature to the release form sent to him by the court. That signed form was taken by the mother to the social worker. It was filed in the case, though not until after the hearing on March 25. It appears in the record.

We consider that the father, in fact, received the service from the court sufficient to satisfy all constitutional right to notice and due process. The discretion of the trial court that he not now be allowed to claim technical lack of service through a 60(b) motion will

not be disturbed.

[3] This court has carefully considered this matter in light of the presumption that the trial court properly exercised its discretion in denying the Rule 60(b) motion. Clark v. Clark, 356 So.2d 1208 (Ala.Civ.App. 1978). We are impressed with the patient action of the trial court in permitting lengthy testimony and legal argument before ruling on the motion. We commend the court for doing so. We are further impressed with the careful consideration of the entire matter and the compassionate understanding of the primary issue, the welfare of the child, exemplified by the four-page judgment upon the motion. This court has great sympathy with the parents of this child, but we are unable to substitute our judgment for that of the trial court in this matter. We

therefore affirm.

AFFIRMED.

BRADLEY and HOLMES, JJ., concur.

THE STATE OF ALABAMA -- JUDICIAL
DEPARTMENT
COURT OF CIVIL APPEALS OF ALABAMA
CIV. 2468

February 24, 1982

On Remand From the Supreme Court

In the Matter of

Mary Ann (Matthews) Kelley,
Matthew Alan Shuttleworth, Father
and Deborah Ann Kelley, Mother

v.

Licensed Foster Parents, et al.

WRIGHT, Presiding Judge.

Whereas rehearing in this matter
was denied by the supreme court, 410 So.2d
896 on February 5, 1982, and the cause
remanded to this court; and

Whereas, the supreme court by opinion
dated October 2, 1981, did reverse the
opinion and judgment of this court, 410

So.2d 894 entered December 10, 1980, and remand the cause to this court with directions;

In accordance therewith, it is therefore the order of this court that our original judgment herein is set aside and judgment is hereby entered reversing the judgment of the Circuit Court of Jefferson County, Alabama, entered August 1, 1980, in civil action CV-JU-80-5042, and remanding the matter to that court with direction to forthwith hold further hearings as set out in paragraph last of said opinion of the Alabama Supreme Court.

REVERSED AND REMANDED WITH DIRECTION.

BRANDLEY and HOLMES, JJ. concur.

APPENDIX H

SHUTTLEWORTH

VS.

LICENSED FOSTER PARENTS, ET AL

Record on Appeal

(SR. 5-6):

THE COURT: Those two letters, one is dated July the 12th, 1982 to Loring Jones, and the other is directed to me, July 19th --

MR. DILLARD: Yes, sir.

THE COURT: -- from Mr. Beech?

MR. DILLARD: Yes, sir.

Of course, I located those records, excuse me, those letters in the clerk's record downstairs, and found them for the first time when I was preparing my brief.

As Your Honor will recall from our earlier hearings, I on behalf of the

petitioners took the position in the trial court that due process was violated by Your Honor's permitting Mr. Beech to participate in this hearing on behalf of the adoptive parents without my corresponding ability to have discovery from the adoptive parents, and in fact, to have their presence here in the courtroom.

Your Honor ruled adversely to me on that issue, and we went on with the hearing as Your Honor dictated that we would.

It is my feeling, first, Your Honor, and it is the position of the appellants that these letters touch upon that same due process argument which we have made and intend to continue to make in the appellate courts. We would represent to Your Honor that it violates due process for us to have no access to these

adoptive parents, and yet for counsel for Catholic Family Services and counsel for the adoptive parents to correspond with the Court and advise the Court, as those letters do, as to what fine folks and what great upstanding people those adoptive parents are.

We therefore feel that it is appropriate and proper under the rules of appellate procedure for those documents, which of course I found as part of the clerk's record to be included in the record on appeal.

In connection with that, Your Honor, we would point out, and I am sure that it's in the record, but first of all we had all submitted to Your Honor numerous letters, and to Judge Bell for that, over the entire --

THE COURT: Are they all in the

record?

MR. DILLARD: They are all in the clerk's record; yes, sir.

THE COURT: All right.

MR. DILLARD: To my knowledge, the only letters that I found in the file which were written by any attorney to the court without service of those letters upon the opposing counsel were those two letters.

THE COURT: All right.

Record on Appeal

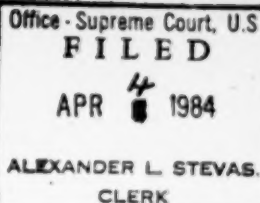
(R. 7-8):

THE COURT: All right.

MR. DILLARD: Judge, the preliminary matters we wanted to mention was that we have previously filed a motion with Your Honor which has been denied which seeks to prevent the participation in

this hearing of Mr. Beech and Mr. Jackson who are the attorneys for the adoptive parents. Your Honor has seen fit to allow their intervention and we don't expect to belabor that point. We only would like to make certain just for the purposes of the record that we do object to their participation in this hearing on the grounds that it denies due process to my clients to have parties to this action who are not -- who have sought and been given permission by the Court not to appear have their attorney, in fact, appear and participate in the hearing. But we're aware of Your Honor's ruling on that motion, but we did want to raise that at this time.¹

¹The due process issues as to notice, and the failure of the Family Court and social worker to follow their own administrative rules and regulations, are documented in the appellate decisions at Appendices B and C.



NO. 83-1282
IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

MATTHEW SHUTTLEWORTH and
DEBORAH SHUTTLEWORTH,

Petitioners,

VS.

CATHOLIC FAMILY SERVICES, and
LICENSED FOSTER PARENTS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE ELEVENTH
CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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Respondent

NO. 83-1282

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SUPREME COURT OF THE UNITED STATES
October Term, 1983

MATTHEW SHUTTLEWORTH and
DEBORAH SHUTTLEWORTH,

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Counsel of Record for
Respondent

QUESTIONS PRESENTED FOR REVIEW

The ultimate question presented for review is: Whether the Alabama Court of Civil Appeals erred in affirming the Judgment of the Family Court of Jefferson County, Alabama, in which it was held that although service of process was technically defective, actual notice of a Hearing to terminate parental rights, coupled with a voluntary execution of a Consent to Adoption and Waiver of Rights to appear at said Hearing and to be represented by Counsel, presented a meaningful opportunity to Petitioner, Matthew Shuttleworth, to be present and heard concerning said termination of parental rights, which satisfied the Constitutional requirements of due process of law.

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STATEMENT OF THE CASE

This case began March 11, 1980, in the Family Court of Jefferson County, Alabama, by the filing of a Petition to terminate the parental rights of Deborah Ann Kelley and Matthew Shuttleworth to a child born out of wedlock on January 1, 1980. By Judgment dated March 11, 1980, the parental rights of Deborah Kelley were terminated.

On that day, a notice was sent to the putative father, Matthew Shuttleworth, at his home address in Decatur, Alabama. The letter was delivered to the address and Hugh R. Shuttleworth, the father of Matthew Shuttleworth, signed the receipt for said letter. The letter was placed in Matthew Shuttleworth's room and he was informed that the letter had arrived. Matthew Shuttleworth testified that he

did receive the letter, that he knew it was addressed to him, and that it was addressed from the Family Court of Jefferson County. He stated he discussed the letter with Deborah Kelley who told him the letter was a notice of Hearing to be held on March 25, 1980, concerning his parental rights and also contained certain papers for him to sign. Matthew Shuttleworth was aware at the time he received the letter that the parental rights of Deborah Kelley were terminated on March 11, 1980, by her consent.

Deborah Kelley delivered to an agent of Catholic Family Services a Consent to Adoption and Waiver of Appearance, Waiver of further notice in the proceeding and Waiver of the right to Counsel, signed by Matthew Shuttleworth, dated March 28, 1980.

Approximately three months later, Petitioner, Matthew Shuttleworth and Deborah Kelley Shuttleworth, began efforts to set aside the Judgment terminating their parental rights. Following a long line of appeals, the Court of Civil Appeals of Alabama affirmed the finding of the Family Court of Jefferson County, Alabama, that Matthew Shuttleworth had received actual notice of the pending proceeding to terminate his parental rights and that he had been afforded adequate opportunity to be heard on that matter and that he had knowingly consented to the adoption and effectively waived all other parental rights to the child, the cumulative effect of which satisfies the Constitutional requirements of due process of law.

ARGUMENT

Respondents move the Court to deny the Petition for Writ of Certiorari to the Court of Civil Appeals of Alabama on the grounds that the Petition fails to follow the rules of this Court by failing "to specify the stage in the proceedings, both in the Court of First Instance and in the Appellate Court, at which the Federal questions sought to be reviewed were raised: The method and manner of raising them and the way in which they were ruled upon by the Court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears as will show that the Federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on Writ of

Certiorari. Rule 21(h). As further grounds for the denial of the Petition, Respondent would show unto the Court that the Petitioners have been afforded due process of law at all stages of the proceedings in the Alabama State Courts.

The facts in this case, as determined by the Alabama Courts, involve unwed parents, whose parental rights were terminated by Judicial Decree.

The Trial Court stated and found that:

"The mother's consent to support the adoption is unquestioned. She had previously sought an abortion of this unborn child but was found by the doctors to have been too far into her pregnancy. On March 11, 1980, she signed an affidavit requesting the "the court to terminate all my parental rights in and to the custody of this child in order that an adoptive placement might be made."

The father's behavior and actions from the time the mother first indicated her desire for an abortion until after his rights were termina-

ted on March 25, 1980, are a study in ambivalence and indecisiveness. Time after time the father had the opportunity, had he so desired, to stop the proceedings toward the termination of his parental rights. He consistently vacillated or remained mute when he should have been forthright, outspoken, even obtrusive and vociferous with his intentions on such an important matter.

Matthew Shuttleworth and his mother journeyed with Deborah Kelley and her parents to Atlanta, Georgia on November 1, 1979, to see a doctor about an abortion for Deborah. Deborah had told Matthew that she had contacted the Catholic Social Services and Laura Dinwiddie (sic) before the child's birth on November 2, 1979, and wanted to place the child for adoption.

The child was born on January 1, 1980. Matthew knew that Laura Dinwiddie picked up the child at the hospital on January 4, 1980, for the purpose of adoptive placement. Not until almost six months later did Matthew contact the Catholic Social Services, and he never contacted this court.

Deborah told Matthew that he had rights over the child and

Matthew stated he was going to get a lawyer and fight. He knew that Deborah went to court on March 11, 1980, and that her parental rights were terminated.

Matthew's father signed for the letter from the Family Court of Jefferson County on March 13, 1980. Matthew received the court letter on March 14, 14, or 15, 1980, and turned the letter over to Deborah. She told him it concerned his court hearing which was to be held in two weeks. But the letter was placed in Deborah's glove compartment of her car and it remained there until March 21st or March 28th, at which time the letter was voluntarily signed by Matthew and turned over to Laura Dinwiddie (sic) of the Catholic Social Services.

It is uncontroverted that Matthew voluntarily signed the document which constituted a waiver of his rights. Although the paper was not notarized, it is unconceivable that Matthew, a college student, did not know what he was signing.

Matthew's excuses that he did not read the document on one of these dates because he might be late for a cosmetology class, and that he

believed the document was for "confidentiality" purposes were anemic and lacked credence. In fact, much of his testimony appeared disingenuous.

The Court finds under Matthew Shuttleworth's testimony and the undisputed evidence, that prior to the hearing, he received from this court and possessed a document fully disclosing the nature of the proceeding, the time and place of the hearing and his right to counsel. It was his sole decision not to open it, if in fact he did not.

The Court further finds that he knew Deborah had been to this court on March 11, 1980, concerning the adoption of the child and on March 12, 1980, the child's mother had informed him there would be a hearing on March 25, 1980, in this court about terminating his parental rights. He received the registered letter from this court on March 13, 14, or 15, 1980. He was informed that it pertained to termination of his rights. He was given the name and whereabouts of the Judge handling the case prior to the hearing.

That by his action and his conduct he clearly waived his rights.

All the parties were at all times residents of Alabama and the fact that the child was born in Tennessee is immaterial.

This Court after seeing and hearing Matthew Shuttleworth testify, together with the other testimony received is convinced that the father's acquiescence amounted to a waiver of his rights and that he in effect consented to the termination of his rights to the child.

The Court finds that under all the evidence heard in open court, most of which is undisputed, that the father received service from the court that was more than sufficient to satisfy all constitutional rights to notice and due process, and that it is for the welfare and in the best interest of the innocent child that this long tragic court proceeding be ended. (Full opinion contained in appendix).

Under Alabama law a "Trial Court's findings are to be accorded the same presumptions as a jury's verdict and

will not be disturbed on appeal unless plainly and palpably wrong or against the greatest preponderance of the evidence." McBee v. McBee, 91 So. 2d 675, 265 Ala. 414.

On appeal of the Trial Court's findings to the Court of Civil Appeals of Alabama, the Court found and held as follows:

(1) Though the mother is now claiming to have been misled and confused by the representations of the social worker for Catholic Services, Mrs. Dinwiddie, there is more than sufficient evidence to conclude the contrary. She first sought an abortion, traveling with her parents and Shuttleworth to Atlanta for that purpose. Upon being informed that an abortion was not medically advised, she sought the aid of Catholic Services in giving birth at a place away from her hometown. She allowed her child to be taken from the hospital and placed in a foster home. She signed a petition and consent for termination of her parental rights and those of the father, and she appeared in

court when the judgment of termination of her parental rights was entered. The court proceedings were instituted away from her home county at her direction. She served as intermediary and informant between Catholic Services and Shuttleworth, keeping him informed of each event and step toward adoption of their child. She contrived, consented to, and participated in every aspect of the proceeding. She therefore may not change her mind and undo what she has done.

(2) The father, Shuttleworth, though not physically participating as fully as the mother, was kept fully informed of everything she was doing. He was present on the trip to Atlanta to secure an abortion. He was present at the birth of the child in Tennessee. He was informed of the role of Catholic Services in that birth and the removal of the child from the hospital. He never saw his child nor contributed to the expense at her birth. He knew that the mother had agreed to her adoption long before she was born on January 1, 1980. He was informed by the mother of the termination of her rights and her consent thereto on March 11, 1980. He admitted to being informed that there was

scheduled another hearing for March 25, 1980, of which he was to receive notice, to terminate his parental rights. He acknowledged that he did receive the registered letter advising him of the hearing and containing consent and waiver form, albeit the letter was not served procedurally according to statute. He acknowledged that he subsequently signed the form contained in the letter at the request of the mother and gave it to her to return to Mrs. Dinwiddie for filing. The court found Shuttleworth had the letter at least ten days prior to the hearing on March 25. He denies opening the letter and examining its contents though he gave it to the mother and discussed with her its contents and the form for waiver of notice and consent. He admits failing to keep an appointment with Dinwiddie set for the morning of March 25. The court was at liberty to disbelieve his denial of opening and examining an official letter from the court, when he knew of its purpose. In fact, the testimony of Shuttleworth and the mother pertaining to misrepresentation and misunderstanding of events leading to the adoption is subject to disbelief.

. . .The form he signed was an admission of knowledge of the pending proceedings and of their purpose. It contained an acknowledgment of service and waiver of further notice. There was consent to termination of parental rights and to placement for permanent custody and adoption. We recognize that the waiver was apparently signed after the hearing and judgment and was not filed in the court. However, it is evidence and indication of the knowledge and state of mind of Shuttleworth after he knew of the judgment terminating the rights of the mother and the pending hearing as to his parental rights.

For some three months subsequent to the termination of parental rights and the direction by the court to find adoptive parents, the Shuttleworths made no effort to set aside the judgment. When this proceeding was begun the child had been in the custody of Catholic Services for her lifetime of nearly six months. The mother had seen her no more than three times. The father had never seen her. Foster parents had fed her, held her, loved her while the parents proceeded with their lives as though they never had a child, even though they were in daily company and subse-

quently married. The dark secret of her birth and being remained hidden from their friends. (Full opinion contained in appendix).

This Court has stated: "many controversies have raged about the cryptic and abstract words of the due process clause, but there could be no doubt that at a minimum, they require the deprivation of life, liberty, or property by adjudication be proceeded by notice and opportunity for Hearing appropriate to the nature of the case."

(emphasis added) Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306. With these words, the Court has established that due process requirements must be examined on a case by case basis for determination of whether a parties' constitutionally protected rights have been protected. It is fundamental in the requirements imposed by

the due process clause that parties in legal proceedings be afforded the opportunity to be heard. However, nowhere does the due process clause, or the cases interpreting it, provide that a party shall be made to be heard.

Grannis v. Ordean, 234 U.S. 385. Respondent submits that in the instant case, the facts demonstrated above, reflect notice and opportunity to be heard appropriate to a case terminating parental rights.

The Petitioner cites Armstrong v. Manzo, 380 U.S. 545 (1965) to support its proposition that the Alabama Court of Last Resort has decided a Federal Constitutional question in a way which conflicts with the decisions of this Court. In Armstrong, the Court held that failure to notify a divorced father

of the pendency of proceedings which would result in adoption of his daughter deprived him of due process of law so as to render the Decree in question invalid.

The instant case is easily distinguishable from the Armstrong case in that Armstrong was not afforded any notice of the pending proceedings concerning the adoption of his child. Whereas in the instant case, by testimony elicited at the Trial from the Petitioner himself, Matthew Shuttleworth, it was clearly shown that Shuttleworth had notice of the pending proceeding designed to terminate his parental rights by virtue of verbal communication with the mother of the child; receipt of a certified letter from the Family Court of Jefferson County, stating the date, time, and place of the Hearing to termi-

nate his parental rights; and the execution of a document in which he consented to the placing of the child for adoption, acknowledgement of the date, time, and place of Hearing to terminate his parental rights; and Waiver of his appearance at said proceeding; and Waiver of his right to counsel.

The opportunity to be heard is one which must be granted at a meaningful time and in a meaningful manner; by virtue of a manner reasonably calculated under all the circumstances to apprise the interested party of the pendency of an action and afford them an opportunity to present their objections. Milliken v. Meier, 311 U.S. 457. The burden to take affirmative action was on the shoulders of Matthew Shuttleworth upon his having actual notice of the time, date, and location of a Hearing to terminate

his parental rights. He was not placed in a position similar to Armstrong, wherein his first notice and opportunity to appear to contest the action was following the Hearing to terminate his parental rights. Matthew Shuttleworth received notice reasonably calculated to afford him the opportunity to be present at the Hearing to terminate his parental rights.

It is well settled that the right to be notified has little reality or worth unless one is informed that the matter is pending and the party can choose for himself whether to appear or default, acquiesce or contest the proceeding. Schroder v. City of New York, 371 U.S. 208. It is likewise clear that Matthew Shuttleworth chose not to appear, chose to acquiesce, and chose not to contest the Hearing to terminate

his parental rights, having full knowledge of the consequences of his acts.

The Petitioner cites to the Court its recent decision in Lehr v. Robertson, U.S. _____, 103 S.Ct. 2985 (1983), as setting forth that an unwed father's relationship with an illegitimate child is to be afforded substantial protection under the due process clause. As the Court stated in Lehr, at page 2993,

"when an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com(ing)' forward to participate in rearing up his child," Caban v. Mohammed, 441 U.S., 380 at 392, 99 S.Ct., at 1768, his interest in personal contact with his child acquired substantial protection under the due process clause. At that point, it may be said that he "act(s) as a father toward his children". *Id.* at 389 n. 7, 99 S.Ct. at 1766, n. 7. But, the mere existence of a biological link does not merit equivalent Constitutional protection. The actions of Judges neither create nor

sever genetic bonds. "The importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association and from the role it plays in promoting a way of life through the instruction of children as well as from the fact of blood relationship." Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, at 844, quoting Wisconsin v. Yoder, 406 U.S. 205, at 231-233.

The Court points out that an opportunity is presented to the natural father to develop a relationship with his children. There is no requirement that he must take advantage of that opportunity, and should he fail to do so, he must accept the consequences of his act. As in Lehr, the Petitioner has never had any significant custodial, personal, or financial relationship with his illegitimate child. Also like Lehr, he has received the benefit of his Constitution-

nal right to due process and the opportunity to form such a relationship before his parental rights were terminated.

Proposition two of the Petition states that the denial of the right to cross-examine the adoptive parents denied Matthew Shuttleworth Constitutional rights. The Petitioner repeatedly argues that nothing has been elicited in the record to determine that Matthew Shuttleworth is an unfit father. Petitioner has failed to see that this is not an issue to be presented before the Court. This issue has never been raised as to the fitness or unfitness of Shuttleworth as a father. The entire matter revolves around his knowing and effectual Consent and Waiver of appearance at a parental rights termination Hearing.

Proposition three of the Petition states that the Alabama Courts have used ex parte communications denying the Petitioner a full Hearing and due process of law in conflict with the decision of the Court in Morgan v. United States, 304 U.S. 1. Petitioner fails to recognize the fact that the Trial Court stated that the ex parte communications which the Petitioner complains of were not considered by the Court and has no credence or effect on the decision of the Court. It is clear that when the Court has not considered evidence, whether or not it is reflected in the Court file, it will not be a grounds for an attack on an otherwise valid decision. All cases cited by Petitioner supporting this proposition, the offending documents, ex parte communications, were considered by the regulatory commission

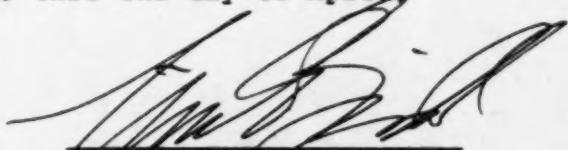
or fact finding body in determining
their final decision.

CONCLUSION

It is clear that the Petitioner, Matthew Shuttleworth, was not denied due process of law in the matter of the termination of his parental rights. He was given adequate notice, reasonably calculated to apprise him of the pending proceedings and designed to afford him the opportunity to oppose the proceedings. By his own admission, he did have actual knowledge of the pending proceeding; and by his inaction, he acquiesced and ratified the proceedings through the statements set forth in the Consent to Adoption and Waiver of further notice, appearance, and counsel in connection with said proceeding which he voluntarily executed. Likewise, it is clear that Deborah Shuttleworth did voluntarily and knowingly surrender all her parental rights.

dent upon the following parties who are all the parties required to be served with the same: Joel E. Dillard, counsel for Petitioners, Matthew Shuttleworth and Deborah Kelley Shuttleworth, P. O. Box 6173, Birmingham, Alabama 35205, by mailing said copies to him by depositing the same in the United States Post Office with first class, priority, postage prepaid.

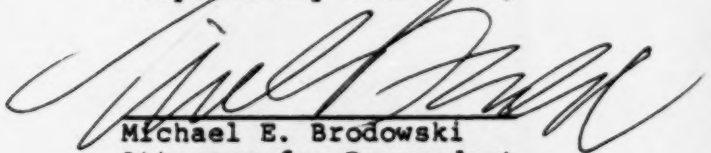
Done this 2nd day of April,
1984.



Michael E. Brodowski
Attorney for Respondent,
Catholic Family Services
2304 Memorial Parkway, S.
Huntsville, AL 35801
Telephone: (205) 534-4571
(Admission date 3/19/84)

For these reasons and for the welfare and in the best interest of the innocent child, which is the subject of this proceeding, the Petition is due to be denied.

Respectfully submitted,



Michael E. Brodowski
Attorney for Respondent,
Catholic Family Services
2304 Memorial Parkway, S.
Huntsville, AL 35801
Telephone: (205) 534-4571
(Admission date 3/19/84)

CERTIFICATE OF SERVICE

I, Michael E. Brodowski, counsel for the Respondent, Catholic Family Services, pursuant to Rules 28.2, 28.3 and 28.5, of the Rules of the United States Supreme Court, hereby certify that I have this day served three copies of the foregoing Brief for the Respon-

APPENDIX A

THE STATE OF ALABAMA -- JUDICIAL
DEPARTMENT
COURT OF CIVIL APPEALS OF ALABAMA
Civ. 3626

July 6, 1983,

Rehearing Denied August 10, 1983

Certiorari Denied November 4, 1983

Alabama Supreme Court 82-1136

WRIGHT, Presiding Judge

This case began March 11, 1980, by the filing of a petition to terminate the parental rights of Deborah Ann Kelley and Matthew Shuttleworth to a child born out of wedlock on January 1, 1980. The petition was filed by Catholic Family Services, which organization had been given custody of the child at birth by her mother. By judgments on March 11 and March 25, 1980, the rights of the parents were terminated and custody of

the child, with permission to place for adoption, was granted to Catholic Family Services.

On June 10, 1980, a Rule 60(b) motion was filed on behalf of the parents, who were then married, seeking to set aside the orders of March 11 and 25. After lengthy evidentiary hearing, the court entered a judgment on August 14, 1980, with extensive finding of fact, denying the 60(b) motion. Appeal of that judgment was brought to this court. We affirmed the judgment of the trial court by decision entered December 12, 1980, Kelley v. Licensed Foster Parents, 410 So.2d 894 (Ala.Civ.App. 1980). Our judgment was reversed by the Supreme Court of Alabama on October 2, 1981. Ex parte Shuttleworth, 410 So.2d 896 (Ala.1981). Application for rehearing

was denied by that court. An order of remand with directions was issued by this court, 410 So.2d 902, on February 24, 1982, to the trial court.

The remandment directions transmitted through this court to the trial court were contained in the last two sentences of the opinion. Id. at 901. Earlier in the opinion, the court determined that the order of the trial court terminating the father's parental rights should have been set aside upon hearing of the 60(b) motion because notice of the hearing for termination was not served in strict compliance with Rule 4.1(c)(2). Thereafter, the court noted that in hearing the 60(b) motion, the trial court held a "protracted custody hearing." The hearing was held without the presence of the adoptive parents. The supreme court set

out the principles controlling claims of custody between natural parents and foster parents. The court then stated that the issue of custody was best determined by the trial court and further said as follows:

"For these reasons the judgment of the Court of Civil Appeals is due to be reversed and the cause is remanded to the Court of Civil Appeals with directions to reverse the judgment of the Family Court of Jefferson County and require it to hold a hearing to determine the parental rights of the petitioners in the light of the principles set forth in this opinion. The family court is also to determine if there has been a valid waiver of rights made by the petitioners.

"Reversed and Remanded with Directions."

Upon application for rehearing, the chief justice (concurring in the result and denial of rehearing) added comment that the sole issue that should be considered by the trial court on remand

was "whether the natural father knowingly consented to the adoption of the child or otherwise waived his right to object." He further commented that the adoptive parents should remain anonymous.

Upon remand, motions were filed by Catholic Services for protection of the adoptive parents. Motions for discovery were filed by the natural parents. All motions were heard by the court on March 19, 1982. The trial court took all under advisement and sought from the supreme court clarification of its opinion of October 2, 1981. There was denial of clarification. The trial judge granted a motion of the natural parents to recuse and removed himself from the case.

In August 1982, the new trial judge denied Catholic Services' motion to protect the identity of the adoptive

parents. Catholic brought a petition for mandamus to this court. We granted the writ of mandamus. The effect was to preserve the anonymity of the adoptive parents until the issue of consent or waiver for the adoption by the father was determined by the trial court.

Petition for writ of mandamus to be directed to this court was granted with opinion on August 16, 1982. Ex parte Nice, 429 So.2d 265 (Ala. 1982). The supreme court reiterated much of its opinion of October 1981 and held that the trial court had broad discretion in permitting discovery to Shuttleworth. The court stated that discovery, of any information in the possession of Catholic Services "which might bear on the issue of whether the father waived his parental rights" was permissible. The court also

said that whether the identity of the proposed adoptive parents would be disclosed was a matter within the discretion of the trial court. However, it said that ordinarily the identity of proposed adoptive parents is not discoverable in a proceeding to rescind an adoption or to set aside an order terminating parental rights.

The chief justice entered a dissent joined by Justice Faulkner. The dissent pointed out that the area of disagreement with the majority was in the disclosure of the identity of the adoptive parents. It said the only issue to be heard was the validity, vel non, of the adoption proceedings. If the adoption was not valid, the natural parents were entitled to custody. If the adoption was valid,

the adoptive parents were entitled to custody. Thus the need to learn the identity of the adoptive parents so that relative fitness could be determined, was unnecessary in either case.

This court, in compliance with the directive of the supreme court, set aside its writ of mandamus. The trial court on October 20, 1982, set a hearing for December 6, 1982, upon the issue of consent and waiver of service of the adoption proceedings. Intervention of counsel for the adoptive parents was permitted on November 3, 1982.

The trial court heard testimony of ten witnesses on December 6 and 9, 1982, with arguments and written briefs. On January 12, 1983, the court entered a lengthy judgment including statement of evidence and finding of fact. The

conclusion was that Matthew Shuttleworth had waived all parental rights to object to the adoption of the child, Mary Ann Kelley. Shuttleworth appeals.

The preceding lengthy recital of the court history of this case is felt necessary for full understanding. To this court, the bottom line of history is that the present and future welfare of a child has been in limbo since its birth on January 1, 1980.

The primary issue presented by this, the third proceeding brought to us in this matter, is: did the court err upon remand in finding that Matthew Shuttleworth knowingly consented to the adoption of Mary Ann Kelley or that he waived his rights to object?

In beginning our discussion, it must be recalled that the supreme court in

its decision of October 12, 1981, Ex parte Shuttleworth, 410 So.2d 896 (Ala.1981), reversed this court's affirmance of the denial of a 60(b) motion by the trial court. That motion alleged fraud, undue influence and misrepresentation by Catholic Services upon the mother to secure her relinquishment of parental rights, and consent to adoption of her child. The motion also charged improper service of notice of hearing to terminate parental rights of the father. This court held that the trial court did not abuse its discretion in denying the Rule 60(b) motion on either ground.

The supreme court granted certiorari and held that we had erred in finding that valid service of notice was had upon the father. Having found service of notice of termination of parental rights legally

insufficient, the court said as follows:

"Having said all of this, we could stop here, reverse and remand the case, and leave dangling a very emotionally sensitive issue, as well as the future hopes and aspirations of several individuals, including a 21 month old infant."

The court then observed that the trial court, while entertaining the 60(b) motion, had, in effect, held a protracted custody hearing, though without the presence of the adoptive parents. It followed that observation with favorable comments about the natural parents and stated principles to be applied in custody claims between parents and nonparents. The supreme court concluded its opinion by stating that it was going to remand to the trial court for the "delicate balancing of these principles. . . ." The remand directions were then given as we previously quoted herein.

It is the best understanding of this court from these pronouncements of the supreme court that it considered that the hearing on the 60(b) motion expanded into a hearing to determine custody of Mary Ann Kelley as between the natural and adoptive parents. It determined that setting aside the termination of parental rights of the father for failure of legal service did not conclude the "sensitive issue" of custody.

In its opinion in Ex parte Nice, supra, the court, referring to its opinion in Shuttleworth stated:

"The third issue addressed but not decided was whether the unwed father had knowingly consented to adoption and whether the parents of the child had otherwise waived their rights to the child. We directed the Court of Civil Appeals to remand the cause to the family court of Jefferson County for a determination of this issue."

This clarification, followed by

discussion and quotations from the case of Williams v. Pope, 281 Ala. 416, 203 So.2d 271 (1967), must have caused the trial court to limit the hearing on remand to the issue of consent or waiver or right by the natural parents to object to the adoption of their child. It is our opinion that such was the proper issue.

[1] Though the mother is now claiming to have been misled and confused by the representations of the social worker for Catholic Services, Mrs. Dinwiddie, there is more than sufficient evidence to conclude the contrary. She first sought an abortion, traveling with her parents and Shuttleworth to Atlanta for that purpose. Upon being informed that an abortion was not medically advised, she sought the aid of Catholic Services in giving birth at a place away from her

hometown. She allowed her child to be taken from the hospital and placed in a foster home. She signed a petition and consent for termination of her parental rights and those of the father, and she appeared in court when the judgment of termination of her parental rights was entered. The court proceedings were instituted away from her home county at her direction. She served as intermediary and informant between Catholic Services and Shuttleworth, keeping him informed of each event and step toward adoption of their child. She contrived, consented to, and participated in every aspect of the proceeding. She therefore may not change her mind and undo what she has done. Williams v. Pope, supra.

[2] The father, Shuttleworth, though

not physically participating as fully as the mother, was kept fully informed of everything she was doing. He was present on the trip to Atlanta to secure an abortion. He was present at the birth of the child in Tennessee. He was informed of the role of Catholic Services in that birth and the removal of the child from the hospital. He never saw his child nor contributed to the expense at her birth. He knew that the mother had agreed to her adoption long before she was born on January 1, 1980. He was informed by the mother of the termination of her rights and her consent thereto on March 11, 1980. He admitted to being informed that there was scheduled another hearing for March 25, 1980, of which he was to receive notice, to terminate his parental rights. He acknowledged that

he did receive the registered letter advising him of the hearing and containing consent and waiver form, albeit the letter was not served procedurally according to statute. He acknowledged that he subsequently signed the form contained in the letter at the request of the mother and gave it to her to return to Mrs. Dinwiddie for filing. The court found Shuttleworth had the letter at least ten days prior to the hearing on March 25. He denies opening the letter and examining its contents though he gave it to the mother and discussed with her its contents and the form for waiver of notice and consent. He admits failing to keep an appointment with Dinwiddie set for the morning of March 25. The court was at liberty to disbelieve his denial of opening and examining an official letter

from the court, when he knew of its purpose. In fact, the testimony of Shuttleworth and the mother pertaining to misrepresentation and misunderstanding of events leading to the adoption is subject to disbelief.

[3, 4] There has been considerable reference to the signing of a jurat to Shuttleworth's signature on the form by Mrs. Dinwiddie as a notary public. That jurat was removed by Mrs. Dinwiddie because she had not actually performed it. Concern about the jurat has little importance - first, because we find no statutory requirement that consent for adoption be notarized; second, because the signature of Shuttleworth to the instrument is admitted. The form he signed was an admission of knowledge of the pending proceedings and of their purpose. It contained an acknowledgment

of service and waiver of further notice. There was consent to termination of parental rights and to placement for permanent custody and adoption. We recognize that the waiver was apparently signed after the hearing and judgment and was not filed in the court. However, it is evidence and indication of the knowledge and state of mind of Shuttleworth after he knew of the judgment terminating the rights of the mother and the pending hearing as to his parental rights.

For some three months subsequent to the termination of parental rights and the direction by the court to find adoptive parents, the Shuttleworths made no effort to set aside the judgment. When this proceeding was begun the child had been in the custody of Catholic Services for her lifetime of nearly six

months. The mother had seen her no more that three times. The father had never seen her. Foster parents had fed her, held her, loved her while the parents proceeded with their lives as though they never had a child, even though they were in daily company and subsequently married. The dark secret of her birth and being remained hidden from their friends. She was exiled in a foreign land - until she found love, care and protective parents who wanted her so badly that they would pay a fee of a thousand dollars to get her. Thereafter, her existence was no longer denied. She came alive in the arms of parents who were proud of her. Parents who surely announced to all that they had a daughter and that she had a family.

[5] Our supreme court spoke poignantly

of the family unit as the basic foundation of our society and the duty of courts to forge chains that will bind it together in its first opinion in this case (R. 901). We endorse that expression. However, chains of a family unit in this case have been forged between Mary Ann and her adoptive parents. They have been bound together for more than three years. Mary Ann knows no other parents or family. It does not require the wisdom of a King Solomon to decide the real parents of this child nor to recognize the devastating trauma which will strike her if her family unit is broken. A family unit is forged through love and caring, one for the other. It does not arise merely from birth and blood. If that were the test, this case would never have arisen.

In Ex parte Nice, supra, the supreme

court said:

"[A] mere change of mind cannot justify the rescission of a decision to place a child for adoption if the natural parents have given an informed, intelligent consent and all the procedural safeguards have been followed."

It is our opinion that these conditions have been met; that the trial court correctly found as a fact that the mother consented and that the father with knowledge of the acts of the mother and the proceedings before the court, acquiesced therein and by his conduct waived his parental right to object to the adoption of his child. It is further our opinion that in regard for finality of judgment and in consideration of the best interest of Mary Ann, the motion 60(b) should be denied.

[6] The second issue presented is that the trial court after Ex parte Nice, supra, denied discovery of information

as to the adoptive parents, but permitted appearance of their attorney in the case. Shuttleworth also complains of the court receiving letters from counsel praising the adoptive parents. In response to this issue we note that the supreme court in Ex parte Nice, supra, expressly left discovery concerning the adoptive parents to the discretion of the trial court after specifically directing that the court's first course was to determine whether the "unwed father had knowingly consented to adoption and whether the parents of the child had otherwise waived their rights to the child." It is our conclusion that the trial court followed the mandate of the supreme court.

The trial judge did not solicit the letters received. He expressly stated he did not consider them and placed them

in the court file. The only issue before the court did not involve the consideration of the respective merits of the natural parents and adoptive parents. This court considers that counsel for the adoptive parents properly had an interest in the case (Rule 24, A.R.Civ.P) if only as amicus curiae. We find no error in allowing him to participate.

AFFIRMED.

BRADLEY and HOLMES, JJ., concur.

APPENDIX B

CASE ACTION SUMMARY

JUVENILE

Name:

Case Number:

Matthews, Mary Ann

JU-80-50402

Address:

Catholic Social Services

Filing Date: 3/11/80 Intake Off. Dunning

D.O.B. 1/1/80 Sex: F Race: W

Parents: Matthew Alan Shuttleworth
Deborah Ann Kelley aka
Deborah Ann Matthews

Attorney: Hon. John C. Fox, GAL, Child

Judge: Hon. G. Ross Bell

Prob. Off. Dunning Type Case: Termination

3-11-80: I hereby appoint Hon. John C.
Fox, as Guardian ad Litem, to
represent the interests of the
infant, Mary Ann Matthews, in
this case.

G. Ross Bell, Judge

This cause coming on for hearing and there being present in open court the petitioner and mother, Deborah Ann Kelley, also known as Deborah Ann Matthews, who is over the age of nineteen (19) years; Hon. John C. Fox, as Guardian ad Litem for the infant; Laura Dinwiddie, (sic) Social Worker with Catholic Social Services, and

It having been made to appear from the petition and from the evidence that said child was born out of wedlock and paternity has not been legally established it appearing that service has not been obtained on the putative father, and

It further appearing that the

mother is unable to provide a fit and suitable home for said infant and to provide for her future support, training and education, and therefore desires to be relieved of its cares and custody, all interested parties in open court having expressed consent and agreement that this be done, and

The Court having considered and understood the same, is of the opinion that it would be in the best interest of the future welfare of said child that the mother be relieved of its custody, and

The Court having found that said child is a dependent child under the age of eighteen (18)

years and in need of the care and protective supervision of this court, it is, accordingly,

ORDERED, ADJUDGED AND DECREED BY THE COURT that all parental rights which the mother, Deborah Ann Kelley, a/k/a Deborah Ann Matthews, has in or to the care and custody of said infant, Mary Ann Matthews, be and they are hereby terminated and severed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this cause be and is hereby continued to March 25, 1980, at 2:00 p.m., for the purpose of obtaining service on the putative father.

G. Ross Bell, Judge

3-25-80

This cause having been heard on March 11, 1980, at which

time the parental rights of the mother, Debroah (sic) Ann Kelley, also known as Deborah Ann Matthews, were terminated, and it being shown to the Court that service had not been obtained on the putative father, the case was continued to this date, and

This cause coming on for further hearing and there being present in open court Hon. Rizpah Morrow, as Guardian ad Litem for the infant; Laura L. Dinwiddie, (sic) Social Worker with Catholic Social Services, and

It having been made to appear to the Court that the putative father, Matthew Alan Shuttleworth,

does have knowledge of this hearing, has discussed the case with the social worker with Catholic Social Services indicating his consent, and having failed to appear, and

The Court having considered and understood the same, is of the opinion that it would be in the best interest of the future welfare of said child that the putative father be relieved of its custody, all interested parties in open court having expressed consent and agreement to the order herein made, it is, accordingly,

ORDERED, ADJUDGED AND DECREED BY THE COURT that all parental rights which the putative

father, Matthew Alan Shuttleworth has in or to the care and custody of said infant, Mary Ann Matthews, be and they are hereby terminated and severed, and the care, custody and control of said child is hereby committed to the Catholic Social Services for permanent placement or adoption.

Costs taxed in the amount of \$25.50 and are hereby suspended.

G. Ross Bell, Judge

6-10-80

MOTION FOR RELIEF FROM JUDGMENT OR ORDER OF THE COURT TERMINATING PARENTAL RIGHTS OF PLAINTIFFS PURSUANT TO RULE 60(b), ARCP, OR IN THE ALTERNATIVE, FOR REVIEW UNDER THAT RULE, filed by Hon. Joel E. Dillard,

Attorney for the mother and father of said child, filed this date and said Motion set for hearing on July 1, 1980, at 9:00 a.m.

7-1-80 On motion of the attorney for the Catholic Social Services and Laura L. Dinwiddie, (sic) this cause is hereby continued to July 21, 1980, at 2:00 p.m., as said attorney is committed to another court.

G. Ross Bell, Judge

7-21-80 This cause coming on for hearing on motion heretofore filed on behalf of the mother and putative father of the child, and there being present in open court the Guardian ad

Litem, Hon. John C. Fox; the mother and putative father, with their attorney, Hon. Joel Dillard; Laura Dinwiddie, (sic) Catholic Social Service with their attorney Hon. Larry Morgan, and

The Court having heard the sworn testimony taken in open court, including that of Beverly Batchum, Laura Dinwiddie, (sic) Hugh R. Shuttleworth and Matt Shuttleworth, and due to the lateness of the hour, this cause is hereby continued to August 4, 1980, at 10:00 a.m. for the purpose of taking additional testimony.

On motion of the attorney for the parents, IT IS HEREBY ORDERED, ADJUDGED AND DECREED

that no adoption proceedings shall be held concerning the said Mary Ann Matthews pending this hearing.

G. Ross Bell, Judge

8-14-80

This cause coming on for hearing on Motion for Relief from Judgment, pursuant to Rule 60(b) filed by the attorney for the mother and father, and there being present in open court on July 21, 1980, the mother and father with their attorney, Hon. Joel E. Dillard; Laura Dinwiddie (sic) with the Catholic Social Services with their attorney, Hon. Larry Morgan; Hon. John C. Fox as Guardian ad Litem for the child, and
The Court having taken the

sworn testimony in open court of witnesses Beverly Batchum, Laura Dinwiddie, (sic) Hugh R. Shuttleworth, Matt Shuttleworth, and the cause having been continued to August 4, 1980, for further testimony, at which time the same parties were present with their attorneys and the sworn testimony was taken in open court of Deborah Ann Kelley, Harold Kelley, Marie Shuttleworth, Betty Kelley, Etta Dunning, and Laura Dinwiddie, (sic) at which time this matter was taken under advisement and continued for the purpose of the attorneys filing Memorandum Brief and Arguments.

The Court having received

excellent and well prepared
briefs and arguments and read
and considered same and having
reviewed the sworn testimony
taken in open court, along with
the many exhibits presented in
open court finds as follows:

Matt Shuttleworth and Deborah
Ann Kelley are over the age of
nineteen (19) years and while
college students they began to
date. It is admitted by all
parties that Deborah Ann Kelley
(hereinafter called the mother)
became pregnant in the early
part of 1979 and that the father
of said expected child was
Matt Shuttleworth (hereinafter
called the father). The mother
and father discussed this

matter in August, 1979, and eventually the parents of both the mother and father were told the situation. The parents of the mother and the father were supportive in these discussions with them and various alternative actions were discussed. The father offered to marry the mother, but the mother refused the offer. On November 1, 1979, the mother and father proceeded to Atlanta with the mother's mother and father, and the father's mother, for the purpose of obtaining an abortion for the mother. The clinic they visited made certain tests and informed them that the mother was too far advanced in her

pregnancy and that an abortion could not be obtained. The following day, the mother, her mother, and girlfriend visited Catholic Social Services and discussed with Laura Dinwiddie, (sic) the caseworker employed by the Catholic Social Services, the possibility of placing the expected child for adoption.

There is much conflicting testimony as to the actual conversations that occurred then and later between Laura Dinwiddie, (sic) the mother, and her mother. The mother testified that Laura Dinwiddie (sic) told them that if the child was placed for adoption, the natural mother and father

would have the right to stop all proceedings and get the child back within one year after the proceedings commenced. The mother also testified that she informed Laura Dinwiddie (sic) that the father of the child had stated that he would not go along with the adoption effort and she was told that there were ways of getting around the father's refusal to cooperate. Laura Dinwiddie (sic) testified that she explained the adoption procedure and that after the child was placed for adoption there would be a year in which the agency would supervise the placement to make certain it was appro-

priate before the final decree. She denies that she stated the parents could get the child back anytime within a year. Laura Dinwiddie (sic) also testified that she informed them that in certain types of cases the father was not named, but if the father was named, he would have to be notified. She further testified that she told them it was not necessary for the father to sign consent papers in order for his parental rights to be terminated.

The child was born in Jackson, Tennessee on January 1, 1980, and the father was present at the time. At the hospital

the mother signed the papers necessary for the child to be removed from the hospital by Catholic Social Services and placed in foster care pending further efforts toward placing the child for adoption. Conversations and other contacts continued between the mother and Laura Dinwiddie (sic) concerning her efforts to have the child placed for adoption. The father did not have contact with the Catholic Social Services or had seen the child since its birth. The father testified that he never agreed with the mother's decision to place the child for adoption nor

did he make any effort to stop the procedure because of his concern for the mother's physical and emotional wellbeing. The mother testified that throughout this period she was under the influence of Laura Dinwiddie (sic) and dependent upon her for advise (sic) and counsel. She also testified that she was not well, physcially or emotionally. Although she persisted in her efforts to have the child placed for adoption, she testified she still felt that she would be able to change her mind later and get the child back within one year after the adoption proceedings were commenced.

At the request of the mother, the agency contacted this court and forwarded necessary preliminary material to file a petition requesting that parental rights to the child be terminated. On March 11, 1980, the mother, with her mother, came to Birmingham where they met with Laura Dinwiddie (sic) and proceeded to this court. A petition had been prepared for the mother to file, and this petition was shown to the mother and her mother with the request that they read and understand before signing. The mother read the petition and said that she understood the petition,

and she signed the petition before court personnel. She was also shown an affidavit which stated her desires to voluntarily have her parental rights terminated and after reading and stating that she understood the paper, she signed and acknowledged before a Notary Public. She appeared before the Judge of this Court in the company of her mother, Laura Dinwiddie, (sic) The Honorable John C. Fox, who had been appointed as Guardian ad Litem for the infant, and the Intake worker connected with this court. She was again asked by the Court if she understood the nature of the

proceedings and if this was what she wanted to do. She responded in the affirmative and The Court entered an order terminating her parental rights and continued the case to March 25, 1980, for the purpose of obtaining service on the father.

A notice was sent on that day to the father at his address in Decatur, Alabama. The letter was delivered to the address and Hugh R. Shuttleworth, the father signed the receipt for said letter. The letter was placed in the father's room and he was informed that the letter had arrived. The father testified

that he did receive the letter, that he knew it was addressed to him, and that it was from this court. He further testified that he did not open the letter but did discuss the letter with the mother. She told him the letter was a notice of the hearing held on March 25, 1980, concerning his parental rights and papers for him to sign. He told her that he would not sign any papers and should get a lawyer to fight the matter but that he would not participate in any proceeding to remove his parental rights.

The mother contacted Laura Dinwiddie (sic) on March 21, 1980, and told her that the

father would come in and sign the paper which the court had sent him agreeing to the termination of his parental rights. The appointment was not kept and the mother called and said that they would be in the morning of March 25, 1980, with the paper; however, that appointment also was not kept. The mother did bring to the Catholic Social Services office and deliver to Laura Dinwiddie (sic) the signed paper on March 28, 1980. The father testified that he did not know what the paper said, that he signed it only because the mother informed him that it was necessary to keep the

matter confidential. The father failed to appear in Court on March 25, 1980, at which time an order was entered terminating his parental rights.

The mother and father testified that they were in continuous contact and conversations about this situation. In May, they came to the conclusion that they wanted to get the child back. The grandparents of the child have backed them in their decisions in the past and are rendering every possible support they can in the present, with the promise to do so in the future. They contacted Laura Dinwiddie (sic) with the

request that the child be returned to them and she informed them that the child had already been placed for adoption and she was unable to return the child.

This is the type case that causes judges to have restless nights. In order to successfully place a child for adoption there must be a final termination of parental rights. If there is any uncertainty or equivocation on the part of the parent, the step certainly should not be taken. Every effort is made to ascertain that any person who is relinquishing their parental rights in order that their

child may be placed for adoption understands what he or she is doing and is doing it voluntarily. The problems which would result in having to remove a child who has been placed for adoption after the proposed adoptive parents have formed an attachment to the child and after the child has become accustomed to its new home and parents could be traumatic to all parties. In all matters concerning a minor child in this court, the goal is to keep ever in mind the present and future welfare and interest of the child.

This is not a hearing concerning a custody controversy.

It is a hearing on a motion to seek relief from the orders of this court entered on March 11, 1980 and March 25, 1980. In such a hearing, under Rule 60(b) of the Alabama Rules of Civil Procedure, the Court is given wide discretion. It has the duty to balance the interest of the parties involved. If an injustice has resulted, The Court must take into consideration the need for finality of judgments. Where many persons have relied on the judgment in good faith, they also must be considered. The burden is on the petitioner to show good cause for having failed to take appropriate action sooner

and prevented any resultant injury to others who have relied on the judgment. In this particular case, it is obvious that the young parents have reached a decision to change a procedure that was commenced and pursued by the mother and not formally objected to by the father. They seek to explain their failure to take appropriate action sooner by their misunderstanding, lack of knowledge, or being under the undue influence and fraudulent statements of the agency worker. The agency denies any fraudulent statements or undue influence on the mother.

It contends that it has acted in good faith and if there was misunderstanding on the part of the parents, it was not intentionally done. It also contends that acting upon the orders of this court they have placed the child for adoption. It is obvious that the proposed adoptive parents have acted in good faith and have taken a child in their home to be adopted. The Court is well aware that regardless of its decision, there will be much sadness concerning the placement of this child. The Court is of the opinion that if such sadness must exist, the ones who allowed it to come into

existence must be the ones to shoulder that burden.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Motion for Relief from Judgment or Order of The Court Terminating Parental Rights should be and is hereby denied.

G. Ross Bell, Judge

8-18-80

It being shown to the Court than an appeal has been filed in this cause, along with a Motion to Continue Stay during Pendency of Appeal, in which the parents attorney, Hon. Joel E. Dillard, moves for an order from this court continuing its stay of adoption proceedings during the pendency of the appeal, and

The Court having heard the arguments of the attorneys is of the opinion that the motion should be and is hereby denied.

G. Ross Bell, Judge

- 8-15-80 Written Notice of Appeal
filed to the Circuit Court of
Appeals this date.
- 12-12-80 Order confirming trial's
court decision filed this date.
(Civil Court of Appeals)
- 10-2-81 Order of the Supreme Court
of Alabama, Reverse, Remanded
with Directions.
- 10-7-81 Motion for Expedited Hearing
on Remand filed by Hon. Joel
Dillard, attorney for the
natural parents. Motion set
for hearing on March 19, 1982,
at 10:30 a.m.

- 10-7-81 Motion to Require Disclosure
of the Names and Addresses of
Any and All Parties Maintaining
Custody, Control and/or
Possession of Mary Ann Kelley,
filed by Hon. Joel Dillard,
attorney for the natural parents.
Motion set for hearing March
19, 1982 at 10:30 a.m.
- 10-22-81 Response to Motion for
Expedited Hearing on Remand
filed by Hon. Susan M. Tuggle,
attorney for Catholic Family
Services.
- 2-5-82 Application for Rehearing
Overruled, Alabama Supreme
Court.
- 2-24-82 Order Reverse and Remanding
with Instruction, Court of
Civil Appeals.

- 2-26-82 Motion for a Protective Order
with "Exhibit A" filed by Hon.
Susan M. Tuggle, attorney for
Catholic Family Services. Motion
set for hearing on March 19,
1982, at 10:30 a.m.
- 2-26-82 Motion for Request for a
Pre-Trial Hearing filed by
Hon. Susan M. Tuggle, attorney
for Catholic Family Services.
Motion set for hearing on
March 19, 1982, at 10:30 a.m.
- 3-19-82 This cause coming on as a
pre-trial hearing on numerous
motions previously filed in this
matter and there being present
in chambers Honorable Joel E.
Dillard, attorney for petitioners;
Honorable Susan Tuggle, attorney
for the respondents; Honorable

John Fox, as Guardian ad Litem
for the child, and

After hearing the statements
and arguments of the attorneys,
the Court, by consent of all
present, takes this matter
under advisement in order that
it may contact the Alabama
Supreme Court to determine
the possibility of a clarifi-
cation by the Alabama Supreme
Court of its opinion dated
October 2, 1981, and report
back to the attorneys.

Decision concerning all
previously filed motions are
withheld pending this case
being under advisement.

G. Ross Bell, Judge

3-19-82

Motion to Recuse filed this

date by Honorable Joel Dillard,
attorney for petitioners.

3-23-82 Pursuant to the order dated
March 19, 1982, the Court has
contacted by telephone Mr. J.
O. Sentell, Clerk of the
Supreme Court of Alabama, to
determine the possibility of
a clarification of the Supreme
Court's opinion dated October
2, 1981, and has been informed
that there will be no further
clarification by the Supreme
Court of its said opinion, and
the Court has so informed the
attorneys.

It further being shown to the
Court that a Motion to Recuse
has been filed by the petitioners
in this matter, and the Court

being of the opinion that it should be granted, it is, therefore,

ORDERED, ADJUDGED AND DECREED that the Judge and the Guardian ad Litem be and are hereby recused in this matter, and that the Presiding Judge of the Tenth Judicial Circuit be requested to assign another Judge to preside over the hearing required by the said opinion of the Supreme Court.

G. Ross Bell, Judge

10-20-82 At a Pre-Trial Hearing this date in which all parties were represented, the Court set December 6, 1982, at 10:00 a.m. for a trial in this cause.

The only issue to be heard

on that date is the question of service and waiver of service.

No discovery will be allowed until permission is granted by the Court. No discovery will be allowed from now until the date of this trial on December 6, 1982.

It is the opinion of this court that this order complies with the latest Supreme Court decision on a Petition for Writ of Mandamus in this case and dated August 16, 1982.

Charles M. Nice, Judge

11-3-82

Motion for Intervention, filed by Honorable Jim Beech on the 16th day of September, 1982, is hereby granted.

Charles M. Nice, Judge

1/12/83 This cause having been heard for two days on December 6 and 9, 1982, and there was present in open court Hon. Robert Sutton as Guardian ad Litem for the child; the parents, Matthew and Deborah Shuttleworth, with their attorney, Hon. Joel Dillard; Laura Dinwiddie, (sic) Catholic Social Services, with their attorney, Hon. Susan Tuggle; Hon. James L. Beech, attorney for the unidentified adoptive parents who were not present, and

 The Court having heard the sworn testimony in open court including that of H.R. Shuttleworth, Mrs. H.R. Shuttleworth, Bobbie Shuttleworth,

Etta Dunning, Betty Kelley,
Harold Kelley, Deborah Shuttle-
worth, Matthew Shuttleworth,
Judy Johnson, Laura Dinwiddie
(sic), and

After hearing the evidence,
the arguments of the attorneys,
reading the depositions and
briefs filed by the parties,
all of which having been
considered, this Court finds
as follows:

The facts of this case have
been set out in the opinions
of the Court of Civil Appeals
of Alabama, 410 So. 2d 894,
and the Supreme Court of
Alabama, 410 So. 2d 896.

The Supreme Court of Alabama
held that the critical question
was whether a parent is

entitled to notice prior to the revocation of any parental rights he may have. The court cited Rule 13, Alabama Rules of Juvenile Procedure and Rule 4.1(c)(2) regarding service and held that said Rule 4.1(c)(2) must be strictly complied with. The Supreme Court found that said provisions "were not complied with" in this case. Said court reversed the Court of Civil Appeals which had affirmed Judge G. Ross Bell's decision of March 25, 1980, terminating the father's parental rights and placing the child with the Catholic Social Services for adoption.

The cause was ordered remanded to the Family Court of Jefferson County to determine the parental rights of the petitioners and to determine if there had been a valid waiver of rights made by the petitioners.

Then again in the case before the Supreme Court of Alabama, Special Term 1982; Ex parte: Charles Nice, Circuit Judge, Petition for Writ of Mandamus, In Re: In the Matter of Mary Ann Kelley, et al v. Licensed Foster Parents, the court repeated its previous decision that the unwed father was entitled to notice that he had not been afforded proper notice in that Rule 4.1(c)(2) Alabama Rules of Civil Procedure was

not complied with. The Supreme Court directed the cause to the Family Court of Jefferson County for a determination of whether the father waived his parental rights.

In his dissent the Chief Justice stated that "all the trial court needs to do is to determine whether there was a consent (or valid service) by the natural father sufficient to support the adoption." (fn 1)

The mother's consent to support the adoption is unquestioned. She had previously sought an abortion of this unborn child but was found by the doctors to have been too far into her pregnancy. On

March 11, 1980, she signed an affidavit requesting the "the court to terminate all my parental rights in and to the custody of this child in order that an adoptive placement might be made."

The father's behavior and actions from the time the mother first indicated her desire for an abortion until after his rights were terminated on March 25, 1980, are a study in ambivalence and indecisiveness. Time after time the father had the opportunity, had he so desired, to stop the proceedings toward the termination of his parental rights. He consistently

vacillated or remained mute when he should have been forthright, outspoken, even obtrusive and vociferous with his intentions on such an important matter.

Matthew Shuttleworth and his mother journeyed with Deborah Kelley and her parents to Atlanta, Georgia on November 1, 1979, to see a doctor about an abortion for Deborah. Deborah had told Matthew that she had contacted the Catholic Social Services and Laura Dinwiddie (sic) before the child's birth on November 2, 1979, and wanted to place the child for adoption.

The child was born on January 1, 1980. Matthew knew that

Laura Dinwiddie picked up the child at the hospital on January 4, 1980, for the purpose of adoptive placement. Not until almost six months later did Matthew contact the Catholic Social Services, and he never contacted this court.

Deborah told Matthew that he had rights over the child and Matthew stated he was going to get a lawyer and fight. He knew that Deborah went to court on March 11, 1980, and that her parental rights were terminated.

Matthew's father signed for the letter from the Family County of Jefferson County on March 13, 1980. Matthew

received the court letter on March 13, 14, or 15, 1980, and turned the letter over to Deborah. She told him it concerned his court hearing which was to be held in two weeks. But the letter was placed in Deborah's glove compartment of her car and it remained there until March 21st or March 28th, at which time the letter was voluntarily signed by Matthew and turned over to Laura Dinwiddie (sic) of the Catholic Social Services.

It is uncontroverted that Matthew voluntarily signed the document which constituted a waiver of his rights. Although the paper was not notarized,

it is inconceivable that Matthew, a college student, did not know what he was signing.

Matthew's excuses that he did not read the document on one of these dates because he might be late for a cosmetology class, and that he believed the document was for "confidentiality" purposes were anemic and lacked credence. In fact, much of his testimony appeared disingenuous.

The Court finds under Matthew Shuttleworth's testimony and the undisputed evidence, that prior to the hearing, he received from this court and possessed a document fully disclosing the nature of the

proceeding, the time and place of the hearing and his right to counsel. It was his sole decision not to open it, if in fact he did not.

The Court further finds that he knew Deborah had been to this court on March 11, 1980, concerning the adoption of the child and on March 12, 1980, the child's mother had informed him there would be a hearing on March 25, 1980, in this court about terminating his parental rights. He received the registered letter from this court on March 13, 14, or 15, 1980. He was informed that it pertained to termination of his rights. He was given the

name and whereabouts of the Judge handling the case prior to the hearing.

That by his action and his conduct he clearly waived his rights.

All the parties were at all times residents of Alabama and the fact that the child was born in Tennessee is immaterial.

This Court after seeing and hearing Matthew Shuttleworth testify, together with the other testimony received is convinced that the father's acquiescence amounted to a waiver of his rights and that he in effect consented to the termination of his rights to the child.

The Court finds that under

all the evidence heard in open court, most of which is undisputed, that the father received service from the court that was more than sufficient to satisfy all constitutional rights to notice and due process, and that it is for the welfare and in the best interest of the innocent child that this long tragic court proceeding be ended.

Therefore, This Court finds that all parental rights which the father, Matthew Alan Shuttleworth has in or to the care and custody of said child, Mary Ann (Matthews) Kelley, be and they are hereby terminated, that the best interest of said

child require it to remain in the custody of the adoptive parents, and that the petition filed under Rule 60(b), Alabama Rules of Civil Procedure, should be and is hereby denied.

Charles M. Nice, Judge

fn.1

The Chief Justice dissented on the question of whether discovery should be allowed to permit disclosure of the identity of the adoptive parents.

Although the Family Court was granted the right to allow this disclosure, the Family Court denied petitioner's motion for discovery believing disclosure to be unnecessary.

3-30-83

This cause coming on for hearing on Motion to Supplement

Record, filed by Honorable
Joel E. Dillard, and there being
present in open court
Honorable Susan Tuggle; Honorable
James Beech; Honorable Joel
Dillard; Honorable C. Cole as
Guardian ad Litem for the child,
and

The Court having heard arguments
of the attorneys, hereby grants
the Motion to Supplement
Record.

Charles M. Nice, Judge

APPENDIX C

STATE OF ALABAMA)

COUNTY)

Personally appeared before me, the undersigned authority in and for said county and state, Matthew Alan Shuttleworth, who, being made known to me, deposes and says as follows:

My name is Matthew Alan Shuttleworth, being over the age of nineteen (19) years, and I am a resident of Decatur, Alabama.

I have been informed Deborah Ann Kelley (AKA) Deborah Ann Matthews gave birth to a baby girl on January 1, 1980, at Jackson-Madison County Hospital, in Jackson, Tennessee, and the mother has alleged that I am the father of said child. I neither admit nor deny that I am the father of said child.

It is my understanding that Deborah Ann Kelley (AKA) Deborah Ann Matthews has enlisted the aid of Catholic Social Services in Birmingham, Alabama, in making plans to place this child for adoption, and has petitioned the Family Court of Jefferson County for an appropriate order authorizing this action. If this is her plan and desire I would join in this request.

I herewith acknowledge service of summons of the pendency of the permanent custody proceeding in the said Family Court of Jefferson County, Alabama, now set for hearing on the 25th day of March 1980 at two o'clock p.m., under docket number JU 80 50402. I do hereby enter my appearance in said proceeding and waive any other or further notice thereof.

I have been advised that I have the right to employ an attorney and seek counsel elsewhere, and that if I cannot afford to hire an attorney, one will be appointed by the court to represent my interests. I do not believe this to be necessary, and hereby respectfully petition the Court to consent and agree that an order be entered in said proceeding terminating all parental rights which I may have in or to the custody or control of said child resulting in being named as the putative father, and placing the permanent custody of said child with Catholic Social Services for permanent placement or adoption.

-C-4-

Dated this 28th day of March,
1980.

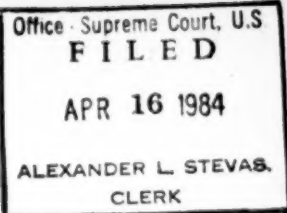
/s/ Matthew Alan Shuttleworth
Matthew Alan Shuttleworth

~~Sworn to and subscribed
before me, this 28th
day of March, 1980.~~

~~/s/ Laura Dinwiddie
Notary Public~~

~~My commission expires
7-29-80~~

Voided
3/28/80



No. 83-1282

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

MATTHEW SHUTTLEWORTH and
DEBORAH SHUTTLEWORTH,
Petitioners,

VS.

CATHOLIC FAMILY SERVICES, and
LICENSED FOSTER PARENTS,
Respondents.

REPLY BRIEF ADDRESSED TO
ARGUMENTS FIRST RAISED IN THE BRIEF
IN OPPOSITION

Of Counsel:	Joel E. Dillard
William J. Baxley	Counsel of Record
Baxley, Beck,	Attorneys for Petitioner
Dillard & Dauphin	
Suite 204	
2100 16th Avenue South	
Birmingham, Alabama	35205

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ARGUMENT

Respondent argues "waiver" and attaches as Exhibit C to its Brief in Opposition a document dated three (3) days after termination of Matthew Shuttleworth's parental rights, and never filed with the Family Court. (See generally, Exhibit C to Respondent's Brief and Exhibit D to the Petition filed with this Court.) Appendix A to our Petition for Certiorari shows the following finding of fact by the Alabama Court of Civil Appeals:

We recognize that the waiver was apparently signed after the hearing and judgment and was not filed in the court.

-- Petition for Certiorari
Appendix A, p. 14-18
(Emphasis supplied)

and the following additional findings regarding that document by the Alabama Supreme Court are also attached:

By her statement, Ms. Dinwitty admits that she saw Matthew for the first time on May 21, 1980, almost two months after his parental rights were terminated. She said that she made the representation to the court concerning agreement of the father because the mother had said on one occasion that he would agree, although on other occasions she had said he would not agree. Deborah testified in court that Ms. Dinwitty told her she had twelve months after the court hearing to make up her mind as to whether or not the surrender of her child would be permanent. Ms. Dinwitty denies making such a representation. She does not deny that she attempted to notarize a consent paper purportedly signed by Matthew Alen Shuttleworth, although she had not seen him sign it. Her jurat on this particular paper was cancelled almost immediately by her, after considering the impropriety of making such a certification.

-- Petition for Certiorari
Appendix B, p. B-7
(Emphasis supplied)

In this case, the Catholic Social Services Agency of Huntsville, through the actions of Ms. Dinwitty, must share much of the responsibility for the emotional trauma suffered by both the natural and the proposed

adoptive parents. The carelessness with which rights so precious as these appear to have been handled is inexplicable.

-- Petition for Certiorari
Appendix B, p. B-7
(Emphasis Supplied)

Ms. Dinwitty admitted that if she had handled the custody proceedings in Madison County, Alabama, she would have written the father and had direct communication from him before final hearing in Family Court. The proceedings were held in Jefferson County at the request of Deborah in order to protect the secrecy of her giving birth to an illegitimate child. In furtherance of the same purpose, the child was born in Tennessee. Similarly, Matthew says he signed the consent because he was told by Deborah that it was necessary to protect the secrecy of the birth, but not to surrender his parental rights.

-- Petition for Certiorari
Appendix B, p. B-8
(Emphasis supplied)

As this Court noted in Lehr v. Robertson,
____ U.S.____, 103 S.Ct. 2985, 77 L.Ed.2d
614 (1983), where an unwed father demon-
strates a full commitment to the respon-

sibilities of parenthood by coming forward to participate in the rearing of his child and thereby creating an interest in personal contact with his child, he is entitled to substantial protection under the due process clause. 103 S.Ct., at 2993. Three months after the birth of his only child, Matthew Shuttleworth's parental rights were terminated without notice after an Alabama Supreme Court "full commitment" and "coming forward" finding, as follows:

Matthew never denied paternity of the child and has relentlessly objected to adoption and objected to abortion. Deborah admits he is the father of the child. From the first time he learned that Deborah was pregnant, he wanted to marry her and become the legal father of the child.

-- Petition for Certiorari
Appendix B, p. B-3
(Emphasis supplied)

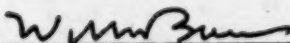
It was Matthew Shuttleworth who introduced the document which appears as Exhibit C to Respondent's Brief in Opposition into the record. The purpose for his doing so was to show the impropriety of the social worker's acts, and to show that she should have obtained a knowing, intelligent and properly executed waiver before attempting to induce the Family Court to terminate his parental rights. Her failure to ever file the sham document which appears as Exhibit C with the Family Court speaks for itself.

CONCLUSION

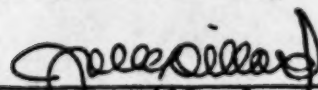
The arguments in Respondent's Brief in Opposition regarding Petitioners' reasons 2, 3 and 4 for granting the writ do not require a reply. This brief is filed as to Reason 1 to prevent any con-

fusion which might otherwise arise regarding the sham "waiver" attached as Exhibit C to the Brief in Opposition.

Respectfully submitted,
BAXLEY, BECK, DILLARD & DAUPHIN



William J. Baxley



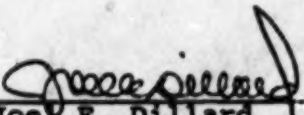
Joel E. Dillard

CERTIFICATE OF SERVICE

I, Joel E. Dillard, counsel for the Petitioners, Matthew and Deborah Shuttleworth, pursuant to Rule 28.5 of the Rules of the United States Supreme Court, hereby certify that I have this day served three copies of the foregoing Brief for the Petitioners upon the following parties who are all the parties required to be served with the same: Honorable Jim

Beech, Tweedy, Jackson & Beech, First
National Bank Building, Jasper, Alabama,
35501, Attorney for Anonymous Foster/
Adoptive Parents; and Honorable Michael
E. Brodowski, 2304 Memorial Parkway
South, Huntsville, Alabama, 35801, At-
torney for Catholic Family Services, by
mailing said copies to them by depositing
the same in the United States Post Office
with first class, priority, postage
prepaid.

Done this the 10th day of April, 1984.



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